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PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

Report of the Working Group on Minorities on its eighth session*

(Geneva, 27-31 May 2002)

Chairman-Rapporteur: Mr. Asbjørn Eide

* This document was submitted late to the Documents Management Section because of the dates of the eighth session of the Working Group.

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Introduction

1. The Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights held its eighth session at the Palais des Nations in Geneva from 27 to 31 May 2002.

2. At the first meeting, the Chief of the Research and Right to Development Branch of the Office of the High Commissioner for Human Rights, Stefanie Grant, made a statement urging Governments to make further contributions to the Office so that it could continue to organize activities on minority rights issues.

3. The Chairman-Rapporteur, Asbjørn Eide, recalled that the main purpose of the Working Group was to propose constructive solutions to various problems that minority peoples faced. He noted that the promotion and protection of minority rights would contribute to social stability and friendly relations among nations. He also stressed that actions undertaken by Governments to maintain law and order should be measured against international human rights standards.

4. Mr. Eide recalled the mandate of the Working Group. He further noted some substantive issues to be taken into account: (a) language and education policy in a multicultural and intercultural society; (b) protection of religious freedom; (c) effective participation of minority persons in economic and social life; and (d) the issue of minorities and development. He recalled work undertaken by the Working Group the previous year, including a seminar in connection with the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, in August/September 2001, a successful country visit to Mauritius, and regional seminars held in Botswana, Honduras and Canada. He expressed his appreciation to the former member of the Working Group, Y.K.Y. Sik Yuen, for his contribution. He concluded by appealing to Governments to make voluntary contributions to enable the Working Group to carry out its mandate.

5. In view of the instruction of the Secretary-General to reduce reports to 16 pages, the Chairman-Rapporteur is regretfully not able to reflect fully all statements made at the session in the present document.

I. ORGANIZATION OF THE SESSION

A. Attendance

6. The Working Group held nine public meetings and one private meeting during its eighth session.

7. The session was attended by the following members or alternates: José Bengoa, Asbjørn Eide (Chairman-Rapporteur), Vladimir Kartashkin, Soli Sorabjee and Leila Zerrougui.

8. The eighth session of the Working Group was attended by observers for 52 States, 62 non-governmental organizations, 2 United Nations organizations and specialized agencies, 1 intergovernmental organization and 10 universities and other institutions. The list of participants is contained in annex 1.

B. Documentation

9. The documents before the Working Group are listed in annex II. All the working papers submitted are available from the secretariat or are to be found at http://www.unhchr.ch.

C. Organization of work

10. At its first meeting, on 27 May 2002, the Working Group, in accordance with its mandate, adopted the following agenda:

1. Adoption of the agenda.

2. Organization of the work.

3. (a) Reviewing the promotion and practical realization of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities;

   (b) Examining possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments;

   (c) Recommending further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

4. The future role of the Working Group.

5. Other matters.

At the same meeting, the Working Group adopted a programme of work.

II. REVIEWING THE PROMOTION AND PRACTICAL REALIZATION OF THE DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

11. The Chairperson-Rapporteur, introduced item 3 (a) recalling that the sub-item provided an opportunity to consider the present situation with respect to minority rights.

12. Mr. Bengoa recalled the work undertaken during the previous year. In the context of the follow-up to the Durban Conference, he stressed the importance of taking into account the various regional seminars already mentioned by the Chairperson and the representative of OHCHR. He further noted the emerging issue of the definition of indigenous peoples and minorities, which had come up in the Botswana workshop on multiculturalism in Africa. In that regard, it was important to utilize the information acquired and the past work achieved by the Working Group.

13. The Chairperson agreed on the need to discuss further the concepts of minority and indigenous peoples as they applied in Asia and Africa. He acknowledged the complexity of the subject and hoped that it would be possible to organize other regional seminars, including in Asia.

14. The lack of legal recognition of minorities was mentioned by the observer for the Centre for Minority Rights Development who said that no steps had been taken by the Government of Kenya to recognize the existence of minorities in the Constitution. The observer for Majlis (on behalf of the indigenous Metei people of Manipur) stated that the identity of the people of Manipur in India was ignored by the Government and by the majority of India and that they were often asked for proof of citizenship. The observer for Casa de la Cultura Indo-Afro-Americana stressed the need to recognize Afro-descendants as a minority in Argentina. She said that a human rights defender for Afro-descendants had been arrested in Argentina and the case had been found racially discriminatory by the Inter-American Court of Human Rights.

15. The absence of State measures to protect non-Arab minorities in Iraq was mentioned by the observer for the Kurdistan Bar Association and the observer for the Turcoman Movement in Iraq. The observers said that the Government of Iraq denied rights to the Kurdish minority who had been removed from their lands in oil-producing areas. The observer for Iraq said that article 5 of the Constitution ensured equal rights for all, including the Kurdish people. There was no discrimination on the basis of a religious belief, and autonomy and the Kurdish language were promoted. He further stated that Iraq was striving to solve the Kurdish issue and that there was no attempt to displace the Kurdish population from oil-producing regions.

16. A number of non-governmental organizations (Indian Muslim Federation (UK), Centre for Study of Society and Secularism, the World Muslim Congress) expressed concern regarding the current violence prevailing in Gujarat, India. They reported mass violations against the Muslim minority in the region. They said that the Government of India had failed to bring the perpetrators to justice. The observer for the World Council of Arya Samaj also expressed concern about the religious clashes in Gujarat and referred to investigations carried out by civil society organizations. The observer for India emphasized that the situation in Gujarat, where violence had been committed by both sides, had brought anguish to the entire Indian population. He mentioned India's long tradition of harmony between people of different religions and asserted that the current violence would not affect this tradition. The Government had made great efforts to normalize the situation; persons suspected of having participated in atrocities had been detained and rehabilitation programmes had been initiated for the victims.

17. The observer for Sudanese Women's Voice for Peace referred to the conflict in Sudan which exacerbated the atrocities committed against minority groups. The absence of State measures to protect minorities was also mentioned by the observer for the Centre for Inter-ethnic Cooperation, who expressed concern about the human rights violations by the Russian army in Chechnya. The observer for the Russian Federation said that government involvement in Chechnya was an act of counter-terrorism.

18. The observer for Sri Lanka recognized that the preservation of language, religion and culture could be protected only if the group identity were preserved. However, there was a

danger that the glorification of group identity might lead to the sacrifice of individual rights and only through the protection of individual rights could minority group identity be protected. The observer for the Baha'i International Community alleged persistent persecution of the Baha'i community in the Islamic Republic if Iran. She stated that the Baha'i were not recognized as a religious minority under the Iranian Constitution.

19. The observer for the World Forum of Fisher Peoples stated that multinational fishing corporations were threatening the livelihood of indigenous and minority small-scale fisher people, who numbered more than 100 million in Africa and Asia and who depended entirely on fish for their livelihoods. The observer for the Movimiento de Mujeres Dominico-Haitianas underlined that the right to nationality of Haitian descendants in the Dominican Republic was being violated. Therefore, they were subject to expulsions and could not fully participate in the public life of the country.

20. The observer for the Balochistan Rights Movement referred to the situation of the Baluchi people in Pakistan whose rights of ownership were being denied. He stated that the national plans for exploiting Balochistan's petroleum reserves did not provide his people with adequate compensation. He alleged that military actions had been used by the Government of Pakistan to oppress minority provinces.

21. The observer for Cymuned stated that the Welsh-speaking minority of Wales in the United Kingdom was experiencing increasing difficulties in enjoying its right to continue as a distinct cultural and linguistic group. He argued that the Government of the United Kingdom should adopt appropriate legislative measures to nurture this minority language. In response, the observer for the United Kingdom stressed that his Government was taking steps to promote the Welsh language through the Welsh Assembly's Culture Committee which was expected to report at the end of June 2002.

22. The observer for the Bhutan Women and Children Organization referred to the situation of Bhutanese Nepali-speaking refugees in Nepal. She stated that children born in refugee camps were being denied the right to nationality and the right to return to Bhutan. Their right to education was also being denied. She said that Bhutan had enacted discriminatory legislation targeted at Nepali-speaking people in Bhutan, and that their rights were also being violated with respect to obtaining employment and travel documents.

23. The observer for the Western Thrace Minority Graduates Association reported on a Greek policy to discriminate against Greek members of the Turkish Muslim minority. He argued that the minority education system was not being maintained. This included the lack of trained minority teachers and lack of education in the mother tongue of the minority. The observer for Greece stated that the Turkish Muslim minority was free to practise their religion, culture and language. Freedom of association was guaranteed both in law and practice. He further stated that education for minorities was provided in the Greek and Turkish languages, and drew attention to the concluding observations of the Committee on the Elimination of Racial Discrimination, which welcomed measures taken by the Government to promote minority rights.

24. The observer for the Centre for Multiculturality stated that civil war and the economic crisis in the former Yugoslavia had resulted in the reduction of minority rights. Education in

minority languages had been significantly reduced due in part to the lack of qualified minority teachers. The observer for the Quaker Service in Laos said that there was growing concern that education was not being provided to Hmong minority children. The denial of minority education was also mentioned by the observer for the Turcoman Movement in Iraq regarding the Kurdish minority there, and the observer for the Observatory of Linguistic Rights regarding the Basque people whose right to have classes and examinations in the Basque language at the University of Navarre was denied.

25. The observer for the Union pour l'émancipation de la femme autochtone said that Pygmy people faced discrimination and marginalization in the Congo. She stressed the need for their effective participation in decision-making.

26. The observer for Yugoslavia drew attention to the recently adopted law on the protection of rights and freedoms of national minorities in Yugoslavia. The law envisaged the establishment of a Federal Council for National Minorities to address the question of how best to promote and protect national minority rights.

III. EXAMINING POSSIBLE SOLUTIONS TO PROBLEMS INVOLVING MINORITIES, INCLUDING THE PROMOTION OF MUTUAL UNDERSTANDING BETWEEN AND AMONG MINORITIES AND GOVERNMENTS

A. Discussion on autonomy and integration

27. The Chairman introduced item 3 (b) and noted that the Working Group had decided to continue its discussion on autonomy and integration begun at its previous session. The discussion began with the report of the International Seminar on Autonomist and Integrative Approaches to Minority Protection, held on 3 and 4 April 2002 in Copenhagen at the invitation of the Danish Centre for Human Rights (E/CN.4/Sub.2/AC.5/2002/WP.1), which was presented by Zelim Skurbaty and Tom Hadden. The seminar had examined Mr. Eide's report on measures for cultural protection, Prof. Heintze's discussion of the advantages of a flexible concept of autonomy and Mr. Simon's exploration of self-determinative and humanitarian autonomy. As it was acknowledged that the seminar might have been Euro-centric, the participants recommended that the Working Group on Minorities organize similar seminars in Latin America, Asia and Africa. The seminar had also concluded that the word "self-determination" was inappropriate as it raised political difficulties.

28. Mr. Kartashkin questioned references made during the seminar to humanitarian and self-determinative autonomy. He felt that these approaches were dangerous and emphasized that self-determination was not a minority right. He suggested that future studies and seminars be conducted in the Commonwealth of Independent States and Baltic countries in order to investigate different approaches to protecting minorities.

29. The observer for Partners in Participatory Development (on behalf of the Muslim community in Sri Lanka), referring to the ongoing efforts to achieve peace in that country, noted

that power-sharing arrangements were essential for effective participation in decision-making. The observer for Sri Lanka said in response that the Government sought to hear all voices in its plan to create a united Sri Lanka.

30. Numerous NGOs made general comments about autonomy and stressed the need for action owing to ongoing violations of minority rights. The Pastoralist Concern Association Ethiopia mentioned that minority participation in land use, drought management and conflict resolution was vital. Regarding the situation of the Roma and Albanian minorities in the former Yugoslav Republic of Macedonia, the Roma youth organization Anglunipe and the Association for Democratic Initiatives stressed that while both minorities had been nationally recognized in 1991, they did not enjoy full and effective participation in public life. The observer for the Kurdish Reconstruction Organization appealed to the Working Group to help the Kurdish people of Iraq gain self-determination. Several observers commented on the situation of Muslims in India who had been unable to participate in national decision-making.

31. Minority Rights Group International outlined its publication dealing with effective participation of minorities in decision-making processes. The report recommended that States review restrictive citizenship policies as citizenship often facilitated participation. It also suggested that power sharing should be based on parties and not on ethnicity, and that institutions such as a minority ombudsman should be established.

32. Mr. Sorabjee explained the concept of cultural autonomy, including the accompanying minority rights to freely practise their religion and to have their own media. Mr. Sorabjee also concluded that minorities should have a voice but not a veto concerning democratically adopted legislation.

33. Professor Fleiner from the Institute of Federalism in Fribourg emphasized that in places like the former Yugoslavia where minority problems were deeply entrenched, a strong human rights policy could only be effective if there was also democratic consensus.

34. Mr. Bengoa commented that autonomy was becoming the preferred approach as the demand for secession decreased. He therefore suggested the need for legal analysis and a code of conduct concerning autonomy.

Americas

35. Mr. Bengoa presented the report of the regional seminar on Afro-descendants (E/CN.4/Sub.2/AC.5/2002/5) organized by OHCHR in La Ceiba, Honduras, from 21 to 24 March 2002. He said that the World Conference had been a milestone for Afro-descendants as they were recognized as a minority group as a whole. The observer for All for Reparations and Emancipation said that the seminar showed that "minorities" was an evolving term; it could denote who had the minority of power and wealth, and clearly Afro-descendants were usually the minority in that respect.

36. Cecilia Thompson of the International Centre for Ethnic Studies presented the report of the Conference on the Rights of Minorities of African Descent in the Americas (E/CN.4/Sub.2/AC.5/2002/WP.2) (Montreal, 27-30 December 2001), whose main aim of the

seminar was to identify similar problems faced by Afro-descendants and to examine the outcomes of the World Conference. The participants had discussed participation in decision-making, discrimination, and the role of regional and international mechanisms in the protection of minority rights.

Africa

37. Julian Burger, on behalf of the Office of the High Commissioner for Human Rights, presented the report on the third regional workshop on multiculturalism in Africa held in Gaborone from 18 to 22 February 2002 (E/CN.4/Sub.2/AC.5/2002/4). He expressed appreciation for the participation of Working Group member Mr. Sik Yuen and summarized the activities undertaken during the five days. He drew attention to the innovative organization of the workshop, which included a two-day human rights training course, a two-day seminar, and one day facilitated by the United Nations Development Programme Resident Representative with the participation of UNAIDS, the International Labour Organization and the World Health Organization.

38. The observer for the International Federation of Human Rights Leagues said that a seminar on "Euro-Mediterranean Partnership, Cultural Diversity and the Universality of Human Rights" had been held in Rabat, Morocco, in May 2002. The participants were experts and human rights defenders from the Middle East and North Africa. Among other recommendations, the seminar called for a rethinking of the Euro-Mediterranean relationship. The observer for the "Tchad Agir ensemble pour l'environnement" recommended that the traditional methods used to tackle disputes that had been developed over generations in the various regions should be used and strengthened. Ms. Zerrougui stressed that the situation of underdevelopment and poverty that prevailed in Africa affected minorities in particular. She stressed the need for the Working Group to continue its work in Africa.

Europe

39. A discussion on policies by so-called kin-States regarding ethnic or linguistic minorities in neighbouring States dominated discussions concerning Europe under this item, using a law recently adopted in Hungary concerning ethnic Hungarian groups abroad as an example.

40. The observer for Romania noted that not only Romania, but also international bodies such as the Venice Commission and the High Commissioner for National Minorities of the Organization for Security and Cooperation in Europe were concerned about the Hungarian legislation. Her Government's main concern was that the law had extraterritorial effects and granted economic and social benefits, not simply cultural rights. The recent memorandum of understanding concluded between Hungary and Romania had significantly reduced the problem. It implied an undertaking to modify the law, and she hoped that this would be followed up. Romania encouraged regional or international development of more detailed guidelines on the issue.

41. The observer for Hungary stated that the Venice Commission showed that the Hungarian law was not new in Europe. He stressed that while that Commission found that the main

responsibility for minority protection lay with the home State, the home State could contribute to the protection of kin-minorities. Further, the memorandum of understanding had been mentioned in many bodies as a model of conflict resolution.

42. The observer for Slovakia was concerned that the law had been adopted without consultation with concerned countries. He further mentioned that there were 15 ethnic Hungarians in the Parliament of Slovakia, including the Deputy President.

43. Mr. Kartashkin stated that the question was relevant to many countries and that non-binding guidelines on the issue would be helpful because not all aspects of the issue were addressed by international law. Mr. Sorabjee agreed that guidelines could be helpful, particularly because special benefits provided by kin-States could cause instability in the home State. Ms. Zerrougui felt that while many countries failed to protect minorities, the interference of kin-States could be problematic. The Chairman-Rapporteur concluded that guidelines were necessary but the work should start in Europe, where the problem was most topical, and recommended that the OSCE High Commissioner for Minorities should take the initiative in drafting guidelines.

44. An observer representing the Hungarian minority living in Romania felt that the discussion should focus on the benefits of the law for the minority and not simply the Effects on State sovereignty. He suggested that the case be resolved by the International Court of Justice.

45. The Chairman-Rapporteur emphasized that the Hungarian law was important because it might serve as a precedent for other kin-States. That there was an urgent need for clear guidelines and the Working Group would follow the issue closely.

46. A representative of the administration of the Aland Government, speaking as part of the observer delegation of Finland, argued that autonomy might be hard to accept if it was imposed and not designed according to the wishes of the concerned minority. An example was the autonomy imposed on the Alander area. She suggested that possible future initiatives could include a legally binding document on autonomy and the establishment of a High Commissioner for Autonomy.

47. The observer for Latvia outlined his Government's policy regarding minorities. The goals were civil participation and integration in language, education and culture, but he admitted that the Government was aware that more work needed to be done. He also emphasized that Latvia provided secondary education in eight languages and that 20 per cent of the members of Parliament belonged to national minorities.

48. The observer for the Russian Federation praised Latvia's initiatives concerning minorities, but also said that Russia remained concerned about the Russian minority's situation in Latvia. In particular, he mentioned that the European Commission had said that it was crucial to keep the Russian language alive in Latvia.

B. Discussion on development issues and minorities

49. At its fifth meeting, the Working Group began its consideration of development issues and minorities. Two documents were available under this item: the report of the International Seminar on Cooperation for the Better Protection of the Rights of Minorities (E/CN.4/2002/92), held in Durban during the World Conference, and a working paper by Minority Rights Group (E/CN.4/Sub.2/AC.5/2002/WP.6) on minority rights and development: overcoming exclusion, discrimination and poverty.

50. A representative of Minority Rights Group summarized the report by describing three key challenges. Firstly, she maintained that the concept of development should be continually challenged. More creativity in defining the concept would lead to development that was better adapted to benefiting all concerned parties. Secondly, she focused on the need to mainstream minority rights into development. Education of the general public about the disadvantages faced by minorities could minimize any majority resentment at extra benefits for minorities. Finally, she argued that government recognition of minorities was vital as exclusion is often a major cause of poverty.

51. A number of non-governmental organizations mentioned the lack of implementation of the right to participate effectively in decisions at the national and regional levels. They also expressed concern regarding full participation of minorities in economic development in their country and stressed the fact that national programmes and policies should be planned and implemented with due regard to the legitimate interests of minorities. The observer for the National Federation of Indigenous Peoples Organisations in the Philippines stated that the Government's national development programme was planned without any genuine consultation with minorities. The importance of ratification and implementation of ILO Conventions Nos. 107 and 169 was further mentioned. Many NGO observers deplored the negative effects of globalization and economic development on minorities.

52. Mr. Bengoa discussed the link between development and the participation of minorities in society, in particular the need to increase the collective knowledge of minorities so that any participation was meaningful and fully informed. Regarding increased government cooperation with minorities, he suggested it would be helpful to consult minorities on whether they felt social investments by financial institutions benefited their communities. Guidelines should be developed for the United Nations specialized agencies and programmes dealing with development. A questionnaire to Governments, United Nations agencies and non-governmental organizations requesting proposals for guidelines could also be given further thought.

53. The Chairman said that the upcoming Social Forum in July and the Working Group's next session would provide more opportunity for discussion. He reminded the Working Group of the need to increase awareness that development can actually increase poverty if initiatives are implemented without meaningful consultations with concerned communities. He concluded that there was a need for further discussions to determine the best methodology to solve these problems.

54. The observer for the Philippines stated that the distinction between minorities and indigenous peoples was of little significance in the Philippines since indigenous peoples were

classified as cultural minorities and were accorded all rights. Collective and individual rights were protected through the protection of indigenous knowledge, the right to self-governance and the preservation of indigenous ancestral domains and other rights.

55. The observer for Pakistan argued that it was important to ensure a framework for equitable development at the international level, which would in turn facilitate national development. He suggested that Mr. Bengoa's recommendations should be channelled through international financial institutions including the World Bank and the IMF so that those institutions were made more aware of both minority and government expectations of their respective roles in development. He further highlighted efforts made by Pakistan in protecting minority rights, particularly via increased minority participation in the electoral system. Special funds for small-scale development projects had been established to help minorities gain education and to carry out cultural activities.

56. The observer for Iraq urged the Working Group to study the roles of minorities vis-à-vis Governments and other minorities so that responsibilities of minorities could be clarified. He emphasized that a concrete definition of "minorities" would aid in determining these duties. He also called for the Working Group to develop strict guidelines on which minorities were entitled to self-determination. He stressed the need for further coordination between the Working Group and the Committee on the Elimination of Racial Discrimination, particularly in terms of State party reports.

57. The observer for India said that minority rights were guaranteed and protected by the Indian Constitution. Customary laws and beliefs were also fully protected. Additionally, several practical measures had been taken to promote the development of minorities by means of affirmative action and inclusion of minorities in decision-making processes.

IV. RECOMMENDING FURTHER MEASURES, AS APPROPRIATE, FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

58. The observer for Austria referred to the most recent minority-related resolutions adopted by the Commission on Human Rights (resolution 2002/57), the Sub-Commission on the Promotion and Protection of Human Rights (resolution 2001/9) and the General Assembly (resolution 56/162). In relation to item 3 (c), he drew attention to the request made by the Commission to the High Commissioner for an analysis of existing special procedures, human rights treaty monitoring bodies and the Working Group on Minorities, in particular with regard to conflict prevention. He noted that reference was made in the resolutions to the United Nations Guide for Minorities.

59. Mr. Kartashkin noted the importance of measures taken by the Commission on Human Rights and the need for the Working Group to develop principles and guidelines for States and minorities. He also suggested that the Working Group should be able to visit countries to listen to the voices of minorities, and suggested that a special session be held in December to celebrate the tenth anniversary of the Declaration on the Rights of Persons Belonging to National or Ethnic

Religious and Linguistic Minorities to further discuss measures to promote and protect minority rights. Finally, he said that 2003 or 2004 should be designated as international year for minorities.

60. Mr. Sorabjee stated that while the resolution of the Sub-Commission referred to State obligations in regard to minority rights, rights without remedies would be of no use. In this connection, it was important for States to take all necessary legal measures to promote the rights contained in the Declaration. It would be better to seek principles and guidelines at the international level, and it would be good to set up minority courts at the national level to provide better protection for minorities. The jurisprudence acquired in these courts over the years would contribute to the promotion of minority rights.

61. The observer for Switzerland said that his Government intended to make a contribution to the minority-related work of the Office of the High Commissioner. He further noted the importance of devising legally binding instruments in relation to minority rights.

62. Ms. Zerrougui stated that the rights of non-nationals should be dealt with since the rights of those people, including migrants, were being eroded, particularly in the context of globalization. She also stressed the need to consider carefully the issue of administration of justice both for national and non-national minorities.

63. A representative of the Minority Rights Group requested the Secretary-General to appoint a special representative on minority rights whose mandate would include the prevention of conflicts.

64. Mr. Hadden of Queen's University, Belfast introduced recommendations relating to the protection and promotion of minority rights. He stated that in the long run, it would be desirable to have a legally binding instrument, which would provide for better monitoring of violations of minority rights, and suggested that article 27 of the Declaration should be expanded to enable country visits to be carried out. He noted, however, that other measures that had been proposed, including the recommendation by the Minority Rights Group concerning the appointment of a special representative of the Secretary-General, would be more effective.

65. The observer for Finland noted that, with regard to the Commission resolution, it would be important to have a legally binding instrument to provide specific protection for minorities. However, she noted that it was necessary to analyse the existing standards to determine the usefulness of a specific convention on minority rights. She also suggested that reform of existing human rights treaty monitoring bodies to ensure better and more effective protection or enhancement of minority rights should be considered. She also stressed the need to establish a voluntary fund to allow minorities to attend the Working Group

66. A representative of the Danish Centre for Human Rights recommended that the agenda of the Working Group be expanded. He supported the proposal to appoint a special representative of the Secretary-General on minority issues and also suggested developing a code of conduct for States including principles and best practices, as proposed by Mr. Hadden. Ms. Thompson drew attention to lessons learned from the Guiding Principles on Internal Displacement. Marc Weller of the European Centre for Minority Issues suggested that consideration should be given to

drafting an optional protocol to article 27 of the International Covenant on Civil and Political Rights and establishing a monitoring body. He also encouraged the Working Group to enhance contacts with regions other than Europe and said that a guide on the minority/majority issues in the different regions of the world would be useful.

67. The observer for Mexico expressed interest in developing principles and guidelines and said that the draft United Nations Declaration on the rights of indigenous peoples would provide some basis for the resolution of crucial issues such as the right to self-determination, integration and autonomy.

V. FUTURE ROLE OF THE WORKING GROUP

68. Under this agenda item, the Chairperson-Rapporteur introduced the recommendations that had been drafted earlier by the Working Group in closed session. He said that the focus in 2003 would be on the drafting of a code of conduct and on a further discussion on development and minorities. He called for reactions to the recommendations, including as regards the future work of the Working Group.

69. Masataka Okamoto of Fukota Prefectual University pointed out that Asia was large and diverse and it would be more efficient to have several seminars in the region. The Minority Rights Group presented its recommendations on behalf of 23 non-governmental organizations (E/CN.4/Sub.2/AC.5/2002/WP.7). In particular, the representative requested clarification about the follow-up taken with respect to the recommendations of minorities. He also stressed the importance of inviting minority NGOs to collaborate with academic experts on working papers, and requested that regionally oriented studies be commissioned. The observer for the Centre for Minority Rights Development encouraged representatives of African States to participate in the Working Group. Ms. Thompson offered to cooperate with the OHCHR in organizing an Asian seminar. Other NGOs expressed the view that the issue of autonomy needed to be kept on the agenda. Additionally, calls were made to hold future seminars on Afro-descendants and to consider the situation of migrants and immigrants. It was further suggested that the special rapporteurs of the Commission be invited to comment on specific country or thematic situations.

70. The observer for Egypt emphasized the role of the Working Group in holding constructive dialogues and that country visits should not become monitoring activities. He further suggested that the Working Group should cooperate closely with the newly established Commission Working Group on Afro-descendants. He, as well as the observer for Iraq, argued that only official documents should be posted on the OHCHR web site. The observer for Switzerland pointed out the importance of translating the Declaration into as many languages as possible. The observer for Finland welcomed the recommendation to consider elaborating a code of conduct and a voluntary trust fund, and in that respect underlined the importance of facilitating the active participation of NGOs. The observer for Latvia argued that there was no basis for comparing the minority situations in the Baltic States and the CIS countries and therefore did not support the recommendation to hold seminars in those regions. The observer for Hungary pointed out that the lack of regional mechanisms outside Europe in relation to minority issues was not helpful for the establishment of a code of conduct or other mechanisms.

71. Mr. Bengoa suggested that the members of the Working Group should meet to develop a methodology for the work to be done both in relation to the drafting of a code of conduct and also for the discussion on the issue of development and minorities. He also responded to some of the concerns relating to the lack of sufficient reflection on issues raised during the present session in the conclusions and recommendations. In that respect, he noted that all issues that had been raised, not only at the present session but also at previous sessions, would be reflected during the drafting process. Mr. Kartashkin recommended that relevant general comments by the human rights treaty bodies be included in the United Nations Guide for Minorities.

72. The Chairman-Rapporteur thanked the NGO representatives for having expressed their concerns, views and expectations to the Working Group. He added that the Working Group wanted to strengthen its role in constructive and peaceful promotion and protection of the rights of persons belonging to minorities and would try to do so at its upcoming sessions or by recommending other mechanisms and procedures.

VI. CONCLUSIONS AND RECOMMENDATIONS

73. On the basis of the discussions held during the eighth session, the Working Group agreed on its conclusions and recommendations for future action. They are set out below.

A. Conclusions

Future work of the Working Group on Minorities

1. The Working Group decides that during the next sessions, the main tasks will be:

(a) Drafting of a code of conduct on the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;

(b) To study in greater depth the development and minorities issue.

2. In regard to the discussion under item 3 (a), minority representatives are encouraged to submit their submissions to the secretariat by the end of February 2003, with a view to such submissions being forwarded to Governments in advance of the next session, thus making it possible for Governments, if they so wish, to prepare their comments or responses in advance of the session.

3. Under item 3 (b), regarding the policy on the web site, pending further detailed discussion, the Working Group recommended the following:

(a) The working papers prepared by the members of the Working Group or authorized by the Working Group would be posted on the web site;

(b) Conference room papers should be posted on the web site for only two weeks prior to the session and during the session itself, to facilitate availability for participants, but should be removed thereafter.

4. The Working Group will seek to further develop its contacts with the national institutions for the promotion and protection of human rights to encourage them to broaden the scope of their work to include minority rights issues.

5. The Working Group will seek to continue and increase its cooperation with regional mechanisms and institutions, including joint initiatives.

6. The Working Group will continue to encourage the holding of training programmes for minority communities and groups on utilizing global, regional and national human rights mechanisms for the better protection of the rights of minorities.

7. Concerning the situation of the Roma, while appreciating the ongoing work being done by the Council of Europe and the Organization for the Security and Cooperation in Europe, the Working Group will continue its own consideration of ways to prevent discrimination against and protect the minority rights of the Roma.

Country visits

8. The Working Group will continue to be available for country visits to countries where minority situations exist, based on general or specific invitations from Governments.

Preparation of a code of conduct

9. In preparing the drafting of a code of conduct, the Working Group will call upon appropriate research or documentation institutes to cooperate in preparing a list of components which may be included.

B. Recommendations

International mechanism

1. The Working Group recommends that the Sub-Commission recommend to the Commission on Human Rights that it explore in due time the possibilities of establishing a special procedure mechanism on the rights of persons belonging to minorities, such as a special rapporteur or special representative. The mandate could include monitoring the implementation of the Declaration, facilitating the provision of technical cooperation on issues relating to conflict prevention, and assisting the Working Group in drawing up a code of conduct.

State obligations and remedies

2. The Working Group welcomes the reaffirmation by the Commission on Human Rights of the obligation of States to ensure that persons belonging to national or ethnic, religious and linguistic minorities may exercise, fully and effectively, all human rights and fundamental freedoms without any discrimination and in full equality before the law, in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

3. Special efforts should be taken by Governments to ensure that minorities that are subjected to manifestations of hatred or xenophobia by majority groups are given the full protection of the police and other security forces, and to this end the Working Group emphasizes the importance of effective and fair administration of justice, effective implementation of legislation, and the need to develop effective national remedies.

Treaty bodies

4. The Working Group welcomes the Commission's invitation to the human rights treaty monitoring bodies, when considering reports submitted by States parties, as well as special representatives, special rapporteurs, working groups of the Commission and relevant United Nations agencies and programmes, to continue to give attention, within their respective mandates, to the situations and rights of persons belonging to national or ethnic, religious and linguistic minorities (2002/57, para. 10).

High Commissioner for Human Rights

5. The Working Group further welcomes the Commission's request to the High Commissioner to submit to the Commission at its fifty-ninth session a report containing an analysis of the information already provided in the reports of existing special procedures, human rights treaty monitoring bodies and the Working Group on Minorities on situations involving national or ethnic, religious and linguistic minorities, in particular with regard to conflict prevention (2002/57, para. 16).

6. The Working Group strongly supports the request by the Commission to the High Commissioner to invite Governments and relevant intergovernmental and non-governmental organizations to submit their views on how best to protect the rights of persons belonging to minorities (2002/57, para. 15).

7. The Working Group recommends that the Office of the High Commissioner for Human Rights organize a seminar on minority approaches in the Asian context and, in connection with the seminar, consider holding a special meeting of the Working Group to celebrate the tenth anniversary of the adoption of the Declaration. The theme of the seminar could be "Recognition of minorities in law and in practice".

8. The Working Group further recommends that the Office of the High Commissioner facilitate the organization of seminars in the Baltic and CIS countries on the protection of minorities, follow-up seminars on Afro-descendants in the Americas, and seminars on multiculturalism in Africa, with particular attention to the concept of minorities and indigenous people in that continent.

Intergovernmental and non-governmental organizations

9. The Working Group invites intergovernmental and non-governmental organizations to inform the Working Group about their activities and reports on human rights problems and situations involving minorities (2002/57, para. 11).

10. The Working Group welcomes the Commission's call upon States, intergovernmental organizations, United Nations bodies and non-governmental organizations to participate actively in the work of the Working Group, including through written contributions (2002/57, para. 12).

11. The Working Group also welcomes the Commission's call upon States to facilitate the effective participation of representatives of non-governmental organizations and persons belonging to minorities in the work of the Working Group, and its invitation to the High Commissioner to seek voluntary contributions in this regard (2002/57, para. 13).

Afro-descendants

12. The Working Group recommends that States take all necessary steps to remedy the consequences of the past exclusion of Afro-descendant people from political and developmental processes, including by the adoption of appropriate affirmative action.

13. The Working Group further recommends that international organizations, bodies and agencies, within their respective mandates, adopt measures to facilitate the enjoyment by Afro-descendants in the Americas of all human rights and the development of their communities.

14 The Working Group recalls that for the above purpose, the recommendations contained in the reports from the seminars held in Durban (1, 2 and 5 September 2001), Montreal (27-30-September 2001) and La Ceiba (21-24 March 2002) should be taken fully into account.

Africa

15. The Working Group, having taken note of the report of the third workshop on multiculturalism in Africa (E/CN.4/Sub.2/AC.5/2002/4) calls on the High Commissioner on Human Rights to consider the recommendations made therein addressed to her Office and to draw to the attention of other relevant agencies the recommendations made under the heading "UN system".

Voluntary trust fund

16. The Working Group recommends the establishment of a voluntary trust fund to facilitate the participation of minority representatives and experts from developing countries in the Working Group and other activities relating to the protection of minorities.

Recommendations of international human rights mechanisms

17. The Working Group recommends that States parties to the human rights conventions respect the recommendations emanating from international human rights complaints mechanisms.

Recommendations adopted at the seventh session

18. The Working Group reiterates the recommendations adopted at its seventh session (see E/CN.4/Sub.2/2001/22, chap. VI), which have not yet been fully implemented, including:

(a) That Governments "consider providing the Working Group with information about constitutional, legislative, judicial, administrative and financial developments of relevance to the implementation of the Declaration" (recommendation 3);

(b) That Governments "consider providing the Working Group with names of experts in minorities in their country, with a view to facilitating their participation in regional and international meetings and in advisory services" (recommendation 4);

(c) That "regional organizations explore the possibility of establishing similar institutions [to that of the Office of the High Commissioner for National Minorities of the Organization for Security and Cooperation in Europe]" (recommendation 5);

(d) That "regional organizations explore the possibility of similar standard-setting and institutional development [to the European Framework Convention on the Protection of National Minorities] taking into account the specificities of the region concerned" (recommendation 6);

(e) That the treaty bodies give adequate attention to the situation of minorities and their cultural rights, including the Roma (recommendation 10); in this regard the Working Group requests the High Commissioner to draw these recommendations to the attention of the relevant treaty bodies.

Information sharing and cooperation

19. The Working Group recommends that OHCHR ensure wider dissemination of information on the activities undertaken by the Working Group.

20. The Working Group recommends that further consideration be given to how wider cooperation between the treaty bodies and the Sub-Commission on the Promotion and Protection of Human Rights, as well as its subsidiary bodies, in particular the Working Group on Minorities, could be strengthened.

Annex I

LIST OF PARTICIPANTS

I. MEMBERS

Mr. Asbjørn Eide (Chairperson-Rapporteur)
Mr. José Bengoa
Mr. Vladimir Kartashkin
Mr. Soli Sorabjee
Ms. Leïla Zerrougui

II. STATES MEMBERS OF THE UNITED NATIONS REPRESENTED BY OBSERVERS

Argentina, Armenia, Austria, Azerbaijan, Bahrain, Bangladesh, Bosnia and Herzegovina, Bulgaria, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Denmark, Dominican Republic, Egypt, Estonia, Finland, Germany, Greece, Hungary, India, Iran (Islamic Republic of), Iraq, Japan, Latvia, Lithuania, Malaysia, Mauritius, Mexico, Netherlands, Norway, Pakistan, Philippines, Portugal, Romania, Russian Federation, Slovakia, South Africa, Spain, Sri Lanka, Thailand, Turkey, Tuvalu, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Viet Nam, Yugoslavia.

III. NON-MEMBER STATES REPRESENTED BY OBSERVERS

Holy See, Switzerland.

IV. UNITED NATIONS BODIES AND SPECIALIZED AGENCIES AND OTHER INTERGOVERNMENTAL ORGANIZATIONS

United Nations Development Programme, Office of the United Nations High Commissioner for Refugees, European Commission.

V. NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL (GENERAL CONSULTATIVE STATUS, SPECIAL CONSULTATIVE STATUS AND ROSTER)

All for Reparations and Emancipation, Baha'i International Community, Federal Union of European Nationalities, Indian Council of Education, Indian Movement "Tupaj Amaru", Indian Muslim Federation (UK), Interfaith International, International Federation of Human Rights Leagues, International Movement against all Forms of Discrimination and Racism, International Service for Human Rights, Minority Rights Group International, Pax Romania, World Muslim Congress.

VI. NON-GOVERNMENTAL ORGANIZATIONS NOT IN CONSULTATIVE STATUS

African Canadian Legal Clinic, Anglunipe Youth Organization, Association des Assyro-Chaldéens de France, Association for Democratic Initiatives – Macedonia, Balochistan Rights Movement, Bangladesh: Hindu-Buddhist-Christian Communities in Switzerland, Bangladesh Indigenous Peoples Forum, Basque Observatory of Linguistic Rights, Bhutan Women and Children Organization, Casa de la Cultura Indo-Afro-Americana, Centre for Inter-ethnic Cooperation, Centre for Minority Rights Development, Centre for Multiculturality, Centre for Study of Society and Secularism, Child Reach International, Coordinadora Regional de los Altos de Chiapas, México, Cultura de Solidaridad Afroindígena, Cymuned, Human Rights Association – Diyarbakir, Indo-American Kashmir Forum, Indo-Canadian Kashmir Forum, Indo-European Kashmir Forum, Justice and Peace Commission of Pakistan, KAMP-Nal Fed of Indigenous, Kurdish Hewar Association, Kurdish Reconstruction Organization, Kurdistan Bar Association, Majlis, Mécs László Association, Muttahida Quami Movement, Movimiento de Mujeres Dominico-Haitianas, National Federation of Indigenous Peoples Organization in the Philippines, Observatory of Linguistic Rights, Partners in Participatory Development, Pastoralist Concern Association Ethiopia, Quaker Service in Laos, Sikh Human Rights Group, Space Afro-American, Sudanese Women's Voice for Peace, Tchad Agir ensemble pour l'environnement, Union chrétienne pour l'éducation et le développement des désherités, Union pour l'émancipation de la femme autochtone, Turcoman Movement in Iraq, Western Thrace Minority Graduates Association, World Council of Arya Samaj, World Forum of Fisher Peoples.

VII. ACADEMICS AND OTHERS

Yonas Birmeta Adinew (Norwegian Institute for Human Rights), Estheiman Amaya (Norwegian Institute for Human Rights), Siw Bay-Hansen (Norwegian Institute for Human Rights), Christina Binder (Raoul Wallenberg Institute), Gyula Csurgai (International Centre for Geopolitical Studies), Siri Damman (University of Oslo), Fredrik Danelius (Norwegian Institute for Human Rights), Lionel Diss (Norwegian Institute for Human Rights), Maria Stefanova Dzanova (Norwegian Institute for Human Rights), Ida-Elne Engh (University of Oslo), Lidija Basta Fleiner (Institute of Federalism, Fribourg, Switzerland), Donna Galway (Norwegian Institute for Human Rights), Zsolt Gorog (International Centre for Geopolitical Studies), Yves Goudineau (Institut de recherche pour le développement, France), Anette Haug Gro (Norwegian Institute for Human Rights), Rachel Hadden (Queen's University, Belfast, United Kingdom), Tom Hadden (Queen's University, Belfast), Hofseth Hermansen (Norwegian Institute for Human Rights), Monique Hox (Norwegian Institute for Human Rights), Jinxia Huang (Norwegian Institute for Human Rights), Arturs Kučs (Raul Wallenberg Institute), Priscila Lavery (Queen's University, Belfast), Rianne Letschert (Tilburg University, Netherlands School of Human Rights Research), Yue Liu (Norwegian Institute for Human Rights), Maria Lundberg (Norwegian Institute for Human Rights), Richard Thomas Hustad Miller (Norwegian Institute for Human Rights), Are Mjanger (Norwegian Institute for Human Rights),

Chris Moffat (Queen's University, Belfast), Lucy Mukuria (University of Oslo), Irina Nysten (Raoul Wallenberg Institute), Masataka Okamoto (Fukuota Prefectural University, Japan), Anita Inder Singh (St. Antony's College, Oxford University), Zelim Skurbaty (Danish Centre for Human Rights), Charlene Sumnall (Queen's University, Belfast), Zewditu Kebede Tessema (University of Oslo), Cecilia Thompson (International Centre for Ethnic Studies), Bjørn Tore Vagle (Norwegian Institute for Human Rights), Marc Weller (European Centre for Minority Issues), Khema Kumudini Wickremasinghe (Norwegian Institute for Human Rights), Ninglan Xue (Norwegian Institute for Human Rights), Yong Zhou (Chinese Academy of Social Sciences)

and several students from the University of London.

Annex II

LIST OF DOCUMENTS BEFORE THE WORKING GROUP ON MINORITIES AT ITS EIGHTH SESSION

Title	Symbol
E/CN.4/Sub.2/AC.5/2002/1	Provisional agenda
E/CN.4/Sub.2/AC.5/2002/1/Add.1	Annotations to the provisional agenda
E/CN.4/Sub.2/AC.5/2002/2	Report on the visit by the Working Group to Mauritius
E/CN.4/Sub.2/AC.5/2002/3	[Symbol not used.]
E/CN.4/Sub.2/AC.5/2002/4	Report of the third workshop on multiculturalism in Africa: peaceful and constructive group accommodation in situations involving minorities and indigenous peoples (Gaborone, 18-22 February 2002)
E/CN.4/Sub.2/AC.5/2002/5	Report of La Ceiba seminar on Afro-descendants
E/CN.4/Sub.2/AC.5/2002/WP.1	Report of an International Seminar on Autonomist and Integrative Approaches to Minority Protection: Danish Center for Human Rights (Copenhagen, 3-4 April 2002)
E/CN.4/Sub.2/AC.5/2002/WP.2	Jurisprudence of the European Court and Commission on Human Rights in 2001 and minority groups by Prof. Geoff Gilbert, Department of Law and Human Rights Centre, University of Essex
E/CN.4/Sub.2/AC.5/2002/WP.3	Report of Montreal seminar on Afro-descendants
E/CN.4/Sub.2/AC.5/2002/WP.4	Information provided by the Romanian Government
E/CN.4/Sub.2/AC.5/2002/WP.5	Information provided by the Hungarian Government
E/CN.4/Sub.2/AC.5/2002/WP.6	Minority rights and development: overcoming exclusion, discrimination and poverty by Minority Rights International
E/CN.4/Sub.2/AC.5/2002/WP.7	The future role of the Working Group on Minorities by Minority Rights Group International

Title	Symbol
E/CN.4/2002/91 and Add.1 and Add.2	Rights of persons belonging to national or ethnic, religious and linguistic minorities: report of the Secretary-General
E/CN.4/2002/92	Report of the International Seminar on Cooperation for the Better Protection of the Rights of Minorities (Durban, South Africa, 1, 2 and 5 September 2001)
E/CN.4/Sub.2/2001/22	Report of the Working Group on Minorities on its seventh session

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Fifty-fourth session
Agenda Item 5(c)

PREVENTION OF DISCRIMINATION
PREVENTION OF DISCRIMINATION
AND PROTECTION MINORITIES

Report of the Working Group on Minorities on its eighth session

Corrigendum

Paragraph 35 and annex II, item 5

For E/CN.4/Sub.2/AC.5/2002/5 read E/CN.4/Sub.2/2002/40

Paragraph 37 and annex II, item 5

For E/CN.4/Sub.2/AC.5/2002/4 read E/CN.4/Sub.2/AC.4/2002/4

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Item 5 (b) of the provisional agenda

PREVENTION OF DISCRIMINATION

PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES

International Decade of the World's Indigenous People

Note by the secretariat

1. In its resolution 2001/12, the Sub-Commission on the Promotion and Protection of Human Rights recommended that the Coordinator for the International Decade of the World's Indigenous People hold a special fund-raising meeting with the permanent missions in Geneva of interested States and the members of the Advisory Group for the Voluntary Fund for the Decade to encourage financial contributions to the Voluntary Fund for the International Decade and the Voluntary Fund for Indigenous Populations, as well as the appointment of qualified staff, including indigenous persons, from within the regular budget of the United Nations, to assist with the work of the Office of the High Commissioner for Human Rights relating to the indigenous programme, and submit to the Sub-Commission at its fifty-fourth session and its Working Group on Indigenous Populations at its twentieth session a report on the results of initiatives taken.

2. The High Commissioner for Human Rights submitted to Governments an annual appeal for funds for the work of the Office (Annual Appeal 2002: Overview of activities and financial requirements) in which an outline of activities planned under the programme of activities of the International Decade was included. In September and November 2001, a letter of appeal was sent by the Office of the High Commissioner to all Governments requesting contributions for

both indigenous voluntary funds. At the fifty-eighth session of the Commission on Human Rights, a member of the Board of Trustees of the Voluntary Fund for Indigenous Populations and the Advisory Group of the Voluntary Fund for the International Decade was invited to address the Commission in order to provide information about the work of the two funds and make a request for contributions. In April 2002, the Board of Trustees and the Advisory Group held their annual meeting with donor Governments to encourage further contributions. In addition to these activities, the secretariat holds regular meetings with donor Governments to discuss funding for indigenous-related activities being undertaken by the Office.

3. Information on the results of these fund-raising initiatives and the activities implemented under the International Decade is contained in the annual reports of the Office to the General Assembly (A/56/206), the Commission on Human Rights (E/CN.4/2002/96) and the Working Group on Indigenous Populations (E/CN.4/Sub.2/AC.4/2002/6 and E/CN.4/Sub.2/AC.4/2002/7).

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Fifty-third session
Item 5 of the provisional agenda

PREVENTION OF DISCRIMINATION

The concept and practice of affirmative action

Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5

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Introduction

1. In its resolution 1998/5, the Sub-Commission decided, since the subject required careful and comprehensive inquiry, to appoint Marc Bossuyt as Special Rapporteur with the task of preparing a study on the concept of affirmative action, and authorized him to request the United Nations High Commissioner for Human Rights to send out a questionnaire to Governments, international organizations and non-governmental organizations inviting them to send all relevant national documentation on affirmative action.

2. In its decision 1999/106, the Sub-Commission renewed its authorization to the Special Rapporteur to make that request. The questionnaire was sent to Governments, international organizations and non-governmental organizations.

3. The present report is submitted in accordance with Sub-Commission decision 2001/107, in which the Sub-Commission, recalling Economic and Social Council decision 1999/253, expressed its appreciation to the Special Rapporteur for his preliminary report (E/CN.4/Sub.2/2000/11 and Corr.1) and his progress report (E/CN.4/Sub.2/2001/15) and decided to request the Secretary-General to remind Governments, international organizations and non-governmental organizations that had received the questionnaire to submit their responses. A reminder was sent on 28 September 2001. In that regard, the Special Rapporteur would like to express his deep gratitude to the Governments of Bolivia, Canada, Colombia, Cyprus, Fiji, Georgia, Greece, Guatemala, Hungary, Israel, Lebanon, the Libyan Arab Jamahiriya, Pakistan, Paraguay, the Slovak Republic, Spain, Switzerland, Thailand, Trinidad and Tobago, and the United Republic of Tanzania, as well as to the Department of Economic and Social Affairs (Social Integration Department), United Nations Conference on Trade and Development, UNHABITAT, the United Nations University, the International Labour Office, the World Food Programme, the Universal Postal Union, the European Commission of the European Community and the Catholic Women's League Australia Inc., for their substantive replies to the questionnaire.

4. Despite those highly appreciated contributions, the Special Rapporteur notes that many Governments, including those of some States which are known to have, with respect to the concept and the practice of affirmative action, an elaborate constitutional, legislative or administrative framework, did not provide any information. The Special Rapporteur believes, in those circumstances, that his report would give only a very partial and not necessarily representative view of the status of affirmative action measures in the present-day world if it was only based on that information. Some excerpts of replies received which provide particularly useful elements illustrating some of the points raised in the present report are reproduced in the annex.

I. THE CONCEPT OF AFFIRMATIVE ACTION

5. "Affirmative action" is a term used frequently, but, unfortunately, not always with the same meaning. While in the minds of some the concept of "affirmative action" is also covered by the term "positive discrimination", it is of the utmost importance to stress that the latter term makes no sense. In accordance with the now general practice of using the term "discrimination" exclusively to designate "arbitrary", "unjust" or "illegitimate distinctions", the term "positive

discrimination" is a contradictio in terminis: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called "discrimination", or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled "positive". On the contrary, the term "positive action", is equivalent to the term "affirmative action". The former term is more often used in the United Kingdom. In many other countries, such action is known as "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment", etc.

6. As a legal concept, "affirmative action" takes a place in both international and in national law. However, it is a concept without a generally accepted legal definition. Any serious discussion on the concept of affirmative action requires, however, as a prerequisite, a working definition:

> "Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."

7. Policies of affirmative action can be carried out by different actors belonging to the public sector, such as the federal Government or State and local governments, and to the private sector, such as employers or educational institutions.

8. Affirmative action is always directed to a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is based and who find themselves in a disadvantaged position. Although this characteristic is often innate and inalienable, such as gender, colour of skin, nationality or membership of an ethnic, religious or linguistic minority, it does not necessarily always have to be so. As such, past and present affirmative action programmes have been concerned with women, blacks, immigrants, poor people, disabled persons, veterans, indigenous peoples, other racial groups, specific minorities, etc.

9. A crucial question, and one which will induce much disagreement, will be how to decide which groups are sufficiently disadvantaged to deserve special treatment. Although some international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women are particularly relevant, it will often be national legislation that identifies who may benefit from affirmative action provisions.[1]

10. National legislation usually starts with an affirmative action policy that is aimed at a particular disadvantaged group. Yet, the policies are often expanded to other groups. This raises the issue of over-inclusiveness, because sometimes membership in certain groups defined by race, ethnic background or gender is used as a proxy for disadvantage. The genuineness of the relationship between affirmative action and compensation for past or societal discrimination depends on the extent to which race, ethnic background or gender is indeed an indicator of the social evil which the affirmative action programme is intended to remove and the extent to which taking race, ethnic background or gender into account is an appropriate method of combating discrimination. It can occur that affirmative action will benefit some people even though they themselves have not been disadvantaged by past or societal discrimination.[2] Especially in the

United States, this has provoked some discussion.[3] Whereas affirmative action was originally aimed at African Americans, these efforts were, over time, also directed to redress the inequality of other deprived groups, most of them immigrants.[4] The question arose of whether these immigrants, who came voluntarily to the United States, deserved the same protection as African Americans, who were forced into slavery.[5] In essence, the protected groups in the United States comprise a range of individuals who have different legal bases for claims for redress: descendants of free immigrants, of conquered peoples and of slaves.

11. Another issue is the two-class theory, which raises the question of who truly benefits from preferential policies. It appears that it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures. For instance, affirmative action aimed at women will often benefit more white middle-class women than lower-class women of another ethnicity. Or, when affirmative action benefits a broad category, such as Hispanics or Asian Americans, some ethnic groups within those categories will obtain more advantage than others, because they are already high-ranking in economic, educational and occupational status. In other words, beneficiaries of affirmative action programmes tend to be the wealthier and least-deprived members of a group.

12. This two-class theory may result in the creation of yet another "disadvantaged" or "discriminated against" minority within the majority. It is likely that affirmative preference programmes create new disadvantaged groups. Indeed, the majority members who miss out on a desired social good as a consequence of an affirmative preference programme are likely to come from the bottom of the white or male distribution, whereas the minority members who benefit from such programmes are likely to come from the top of the minority or female distribution.[6] Thus affirmative preference may well shift the social burden from one group to another.

13. It may be rather complex to establish whether or not an individual belongs to the target group. For example, how "black" does someone have to be to qualify as "black" in order to be entitled to benefit from affirmative action schemes? As far as immigrants are concerned, it is not always clear which persons still qualify as immigrants when they are second, third or fourth generation immigrants. What about children of mixed marriages? Moreover, there are already cases of individuals or entire groups who redefine themselves and who claim some status in order to benefit from affirmative action measures.[7]

14. Some favour the creation of a new law on personal ethnic and racial status to define those who are eligible for these benefits. Others state that the self-perception of the group and the perception of the wider community in the midst of which the group exists are decisive. Naturally, this perception can change with the passage of time. In this context, General Recommendation VIII of the Committee on the Elimination of Racial Discrimination concerning the interpretation and application of article 1, paragraphs 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination is particularly interesting.[8] After considering information in States parties' reports concerning the ways in which individuals are identified as being members of a particular racial or ethnic group, the Committee stated that such identification should, if no justification existed to the contrary, be based upon self-identification by the individual concerned.

15. It is clear that selecting and defining the target groups for affirmative action programmes present a major problem. This illustrates the importance of not basing affirmative action solely on group membership, but of taking other factors, such as socio-economic factors, into account to verify if someone qualifies for affirmative action. This means a more individualized approach towards affirmative action, awarding opportunities to an individual on the basis of individual needs, rather than only on the basis of group membership.[9]

II. JUSTIFICATIONS GIVEN FOR AFFIRMATIVE ACTION

16. When introducing an affirmative action policy, States will try to justify it vis-à-vis public opinion. The grounds given as justification will mainly depend on the specific social context of the State in question. Some of the most common justification grounds will be discussed below, as well as the counter-arguments made against them.[10]

A. To remedy or redress historical injustices

17. The aim is to compensate for intentional or specific discrimination in the past that still has repercussions today. Certain disadvantaged groups have been subjected to discrimination for long periods, which has put their descendants in an underprivileged position because of, for instance, poor education and training.

18. This justification was and is mainly used in the United States to support the public policies intended to "overcome the present effects of past racial discrimination" against African Americans. United States affirmative action programmes originated in Executive Order 10925 of President John F. Kennedy in 1961 and Executive Order 11426 signed by President Lyndon Johnson in 1965.[11] As such, the United States Commission on Civil Rights maintained: "Affirmative action encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[12] The same rationale is, for instance, used by the Government of Australia in its affirmative action policy towards Australian Aboriginals.

B. To remedy social/structural discrimination

19. The fact that disparities continue to exist in educational, social, economic and other status, indicates that the granting of equality for all before the law establishes formal equality but is insufficient to address adequately practices in society that lead to structural discrimination. In essence, the notion of structural discrimination encompasses all kinds of measures, procedures, actions or legal provisions which are, at face value, neutral as regards race, sex, ethnicity, etc., but which adversely affect disadvantaged groups disproportionately, without any objective justification. This form of discrimination can occur in two ways: one can deliberately conceal one's intentions behind objective criteria; or one can very well act in good faith when requiring certain job skills. Nevertheless, both practices result in indirect or covert discrimination. For example, a minimum height requirement may disproportionately disadvantage women and Asians, and may be an unjustifiable job requirement, when there is no objective need for it, as can be physical tests or writing tests. Such discrimination is not

always detectable on the surface. The traditional concept of the non-discrimination principle only takes a neutral stance, i.e. that of de facto equality, and redresses only express or direct discrimination.[13]

C. To create diversity or proportional group representation

20. Recently, American critical race theorists and other scholars have set out another theoretical basis for affirmative action, namely that the presence of racial and ethnic diversity within the academy and workplace is a necessary component of a just society.[14] In fact, they maintain that a racially and ethnically diverse environment reflects the larger society and promotes a more representative and enriched sense of community. "Positive diversity" seems to them a better approach to achieving compensatory justice for racial and ethnic minorities, and they therefore argue that diversity as a rationale for racial preferences needs to be separated from affirmative action.

21. The notion of diversity as a justification for racial preferences in the context of higher education first appeared in DeFunis v. Odegaard (416 U.S. 312, 1974).[15] In his dissenting opinion, Justice Douglas wrote that it seemed apparent to him that the Supreme Court jurisprudence weighed against the use of racial preferences for remedial purposes, unless "cultural standards of a diverse rather than a homogenous society are taken into account". This diversity rationale was later on applied in Regents of the University v. Bakke (483 U.S. 265, 1978). Justice Powell, writing for the majority, reasoned that race could be used as one of many factors when making admission decisions. The permissible goal was the university's interest in a diverse student body. Academic freedom was felt to include the right to select students, such that different students could bring diverse backgrounds to the campus and that the educational experience could be enriched for everyone.[16]

D. Social utility arguments[17]

22. Proponents of affirmative action often point to the many social goals such a policy would likely serve. A well-designed policy of affirmative action would increase the well-being of many people in different ways.

23. Affirmative action might result in better service to disadvantaged groups, in the sense that professionals from a disadvantaged group have a better understanding and knowledge of problems affecting disadvantaged groups. Furthermore, when members of disadvantaged groups occupy positions of power and influence, the interests of all disadvantaged groups will be better perceived and protected. Fair and visible representation of these disadvantaged groups in various fields, such as employment or education, would provide for better social and political effectiveness in these fields.

24. Another argument is that affirmative action can provide disadvantaged communities with role models which can give them important incentive and motivation. Moreover, the greater participation of members of disadvantaged groups in different social environments will destroy vicious stereotyping and prejudices still exercising a tenacious hold in many societies.

25. However, many argue that this kind of affirmative action brings with it risks to quality. Giving preference to less-qualified persons, solely on the basis of group membership, risks reinforcing stereotyping, instead of achieving the opposite, because of, for example, reduced efficiency in industry and education caused by the lowering of qualification standards. It may actually perpetuate thinking along racial lines.

E. To pre-empt social unrest

26. It may not be ignored that affirmative action programmes, ranging from special programmes for disadvantaged areas and gender preference programmes of the European Union to regional quota programmes of India and Nigeria, are being actively used both to promote the interests of underprivileged members of society and to balance internal inequalities of economic and political power, with the hope of pre-empting social unrest.[18]

27. During the 1960s, the United States was confronted with various racial riots, which came as a complete surprise to many Americans, not only because the riots mostly took place in northern cities, but also because they happened after the Civil Rights Act and the Voting Rights Act came into effect, in 1964 and 1965 respectively. It had finally been forbidden to make any distinction on the basis of race in United States society and the black community had been given the right to vote; but this was still not sufficient for many militant black leaders. Following the very bloody and violent riots in Watts in 1965, the situation was seen as sufficiently threatening by United States politicians for them to take action. Both President John Kennedy and President Lyndon Johnson understood that race relations in the United States had never been so critical. Besides the establishment of poverty programmes, such as President Johnson's famous "War on poverty", an attempt was made to reduce black unemployment through strong affirmative action programmes, such as controversial quotas. According to President Johnson: "You can put these people to work and you won't have a revolution because they've been left out. If they're working, they won't be throwing bombs in your homes and plants. Keep them busy and they won't have time to burn your cars."[19]

F. Better efficiency of the socio-economic system

28. Some economists argue that the elimination of discrimination against disadvantaged groups will serve the efficiency and justice of the socio-economic system. The working of the labour market can be optimized if the present imperfections caused by irrational prejudices are corrected.[20]

G. A means of nation building

29. At the dawn of a new State, efforts are made to create a more egalitarian society and a common nationality to strengthen its sovereignty. Many examples of such efforts have been given by States that gained their independence after a long period of colonization. These States found themselves divided in ethnic conflict or were aware of several groups that were lagging behind.

H. Equality of opportunities or equality of results?

30. It is clear that the main goal of affirmative action is to establish a more egalitarian society. However, there are many competing and conflicting ideals of equality. Equality itself is essentially an undetermined category that is often filled in by policy makers.

31. Two ideals of equality that are particularly relevant to affirmative action are equality of opportunity and equality of results. The choice of an ideal will also determine which affirmative action programmes are desired or favoured and which vision of social justice society wants to implement.[21]

32. Equality of opportunity is consistent with the view that the aim of anti-discrimination law is to secure the reduction of discrimination by eliminating/cleansing from the decision-making processes illegitimate considerations based on race, gender or ethnicity which have harmful consequences for individuals. It is not concerned with the result, except as an indicator of a flawed process. This approach is also markedly individualistic, concentrating on securing fairness for the individual. It comes from a liberal vision of society, reflecting respect for efficiency, merit and achievement.

33. This view of equality is seen as "manageable" in that its aim can be stated with some degree of certainty. For example, in an employment context, it means that individuals are entitled to compete for jobs exclusively on the basis of characteristics needed for the satisfactory performance of those jobs. The proposition is that racial, sexual and ethnic characteristics are irrelevant to the way people should be treated. Thus persons should be selected and recruited without regard to race, gender, ethnic background, etc. Equality of opportunity promotes freedom of choice and free competition between individuals. Therefore, it allows social mobility, up or down, in accordance with people's individual talents and skills. The affirmative action measures that will be consistent with the ideal of equality of opportunity will, not surprisingly, involve measures aimed at skill-building and gender- and colour-blind decision-making (affirmative recruitment and affirmative preference).

34. Critics of equality of opportunity find that the aim should be to fix the outcomes of the decision-making processes. They argue that the basic aim is the improvement of the relative position of disadvantaged groups. This approach tends to be concerned with the relative position of groups or classes, rather than individuals. Equality cannot depend on individual performance.

35. Where equality of opportunity maintains that talents and skills are not distributed uniformly throughout the human race, equality of results states paramountly that skills and talents are distributed uniformly. Men, women, whites and ethnic minorities have on average the same talents and skills. Thus, implementing the ideal of equality of opportunity would be expected to result in equal outcomes, in the sense that men, women, whites and ethnic minorities would be represented in positions of influence and power in proportion to their total strength in society. Following that reasoning, this means that any large disparities in result must therefore necessarily be due to the existence of a system or structure of discrimination which is the result of certain practices.

36. The ideal of equality of results is more controversial because of its methods, which are open-ended and unmanageable, such as the adoption of quotas. Quotas are often criticized for serving to disadvantage other vulnerable groups that have similar claims to equality, for contributing to hostility and resentment between social groups and for failing to take into account the fundamental element of individual choice. This results in the displacement or rejection of those who, under traditional criteria, would have been allocated a social good.

37. But should individuals be asked to make sacrifices to compensate some members of target groups? As stated before, reverse discrimination is absolutely to be avoided. As McCrudden points out, this approach is said to take insufficient account of the extent to which the burden of helping disadvantaged groups falls on third parties who may be "innocent" of past wrong-doing. who may have gained no benefit from discrimination against these groups in the past and who comprise some of the least advantaged sections of the community in terms of their economic circumstances.[22]

38. It is interesting to note that most countries started out with an affirmative action programme consistent with the ideal of equality of opportunity. However, this ideal was gradually replaced by that of equality of results, under pressure of political o. social motives.[23] Often, the two ideals are confused and the legislation does not make clear which ideal of equality it wants to see implemented.

39. Nevertheless, it is clear that the issue is not simply whether one is for or against affirmative action for a particular group. The method by which the betterment of its position is attempted matters greatly in terms of whether such efforts have the support or the opposition of others.[24] A last remark: affirmative action programmes do not substitute for anti-poverty programmes. Nor do they substitute for laws against discrimination, for they provide no benefits for groups such as Chinese or Jewish minorities, which suffer discrimination in many countries but are not, on average, disadvantaged.[25]

III. THE CONCEPT OF AFFIRMATIVE ACTION IN INTERNATIONAL LAW

40. The concept of affirmative action is generally referred to in international law as "special measures". The first mention of these "special measures" was made by the Government of India during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). India suggested that an explanatory paragraph should be included in the text of article 2 specifying that:

> "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear."[26]

41. The representative of India pointed out that the implementation of the principles of non-discrimination raised certain problems in the case of the particularly backward groups still to be found in many underdeveloped countries. In his country, the Constitution and the laws provided for special measures for the social and cultural betterment of such groups. Measures of

that kind were essential for the achievement of true social equality in highly heterogeneous societies. As he felt certain that the authors of the draft covenant had not intended to prohibit such measures, which were in fact protective measures, he therefore thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph. His proposal was withdrawn, although expressly supported by other representatives. However, it was felt that the "difficulty experienced by the Indian representative would best be met by the inclusion of an interpretative statement in the Committee's records, rather than insertion of an additional paragraph in the draft Covenant".[27]

42. According to Craven, the ICESCR does not envisage an absolute equalization of result in the sense of achieving an equal distribution of material benefits to all members of society. It does, however, recognize a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society, based on the idea of equality of opportunity.[28] In its first General Comment, the Committee on Economic, Social and Cultural Rights states that an initial step towards the realization of the Covenant rights is to identify the disadvantaged sectors of the population, which should be the focus of positive State action aimed at securing the full realization of their rights.[29]

43. The idea of equality of opportunity is specifically to be found in articles 7 (c) and 13.2 (c) of that Covenant. Article 7 (c), in particular, specifies that the only legitimate considerations in achieving equality of opportunity for promotion are seniority and competence. Craven argues that States would appear to be under an obligation to eliminate all other barriers to promotion that might exist, both de jure and de facto. In particular, this may require the adoption of positive measures to promote the opportunities of groups in society that are underrepresented in higher management positions. Article 13.2 (c) provides that higher education shall be made equally accessible to all on the basis of capacity. That positive measures may be taken on behalf of certain groups in society is confirmed by the text of article 10.2 and 10.3 of the Covenant, which provides for special measures of protection to be accorded to mothers before and after childbirth and to children, especially in the workplace.

44. However, Craven further adds that all the articles do appear to rule out the possibility of quotas being imposed in the contexts of promotion in employment and access to higher education. They prohibit advantages being given on grounds other than seniority, competence and capacity

45. General comments of the Committee on Economic, Social and Cultural Rights are also of particular interest. General Comment No. 5 includes "disability" as a ground on which special treatment can be justified. An explicit disability-related provision in the ICESCR is absent, probably owing to lack of awareness, but in its general comment, the Committee states clearly:

> "The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all

> persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required."[30]

46. In General Comment No. 13, it is maintained that the adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved. Therefore, in some circumstances, separate educational systems or institutions for groups shall be deemed not to constitute a breach of the Covenant.[31]

47. When the Third Committee of the General Assembly discussed the non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR), the representative of India raised his point again and suggested that article 2.1 of the ICCPR should be followed by an explanatory paragraph reading: "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article."

48. He stated that, owing to past treatment or historical circumstances, a certain sector of the people had to be given greater privileges and protection only for a certain period of time in order to promote the rights of those people to re-establish their equality and conditions under which there would remain no need for such provisions and equal opportunities would exist for all. If the Committee did not favour the insertion of that paragraph in the draft covenant, a passage of similar content should be included in the Committee's report. The Committee again endorsed the point made by the representative of India and stated that that interpretation, to which there was no objection, should be specially mentioned in the report.[32] The same views were held on article 26.[33]

49. In its general comment on article 26 of the ICCPR, which is a general non-discrimination clause, the Human Rights Committee pointed out that:

> "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".[34]

50. The practice of the Human Rights Committee confirmed its view on affirmative action. In the case of Stalla Costa v. Uruguay, the author complained of the preferential treatment, regarding reinstatement to the public service, of former public officials who had previously been unfairly dismissed on ideological, political, or trade union grounds. The author complained that this preferential treatment unfairly prejudiced his own chances of gaining a public-service job.

The alleged discrimination was found to be permissible affirmative action in favour of a formerly disadvantaged group. The Committee considered the Act conferring such preferential treatment to be a "remedy" for persons who had previously suffered from violations of article 26.[35]

51. In Ballantyne, Davidson and McIntyre v. Canada, the Committee found, however, that it was not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade.[36] Thus, the affirmative action provision in this case was found to go too far; it was disproportionate to its ends.

52. The following inferences can be made on the basis of the two International Covenants. During the drafting of the ICESCR and the ICCPR, it was generally accepted that a prohibition of discrimination and distinction, respectively, did not preclude positive measures being taken in favour of disadvantaged groups. It was generally agreed that the prohibition was only aimed at distinction of an unfavourable kind lacking any objective or reasonable basis. Moreover, it was also widely accepted that equality did not mean identity of treatment and that there were cases in which the law was justified in making distinctions between individuals or groups.

53. Therefore, according to Thornberry, it can be concluded that the concept of affirmative action is not contrary to the law of the Covenants.[37] In the same vein, Vijapur argues that the principle of non-discrimination in international human rights law clearly implies compensatory unequal treatment of individuals and groups who do not differ from the majority by their nationality, language or religion but only by their social and economic backwardness. He finds support for his conclusion in the inclusion of special protection clauses in human rights instruments.[38] Yet, it should be stressed that neither of the Covenants has explicitly recognized any obligatory nature of affirmative action.[39] Nor are the form of affirmative action and the situation in which such action must be taken defined, owing to the complexity of the issue.

54. The International Labour Organization (ILO) has been a pioneer in using mainly promotional conventions to realize defined objectives and policies. The ILO has also set out standards to be achieved, consequent with the principle of equal remuneration for work of equal value, incorporated in the ILO Constitution, and of equality of all human beings, irrespective of race, creed or sex, as proclaimed in the 1944 Declaration Concerning the Aims and Purposes of the ILO, adopted by the International Labour Conference at Philadelphia.

55. The ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), which was chiefly aimed at racial discrimination but is applicable to other forms of discrimination as well, engages each member State to undertake to pursue a national policy designed to promote equal opportunities and treatment in respect of employment and occupation with a view to eliminating any discrimination, enacting legislation to that effect and seeking the cooperation of employers' and workers' organizations and other appropriate bodies (arts. 2 and 3). Article 5 is one of the first articles in an international treaty to permit explicitly "special measures of protection or assistance" designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized as requiring special protection or assistance. It is clearly stated that these special measures will not constitute discrimination.

56. In 1960, a similar convention, relating to the field of education, was adopted in the framework of UNESCO. The UNESCO Convention against Discrimination in Education singles out, in its article 1 as a discriminatory act the establishing or maintaining of separate educational systems. Article 2, however, qualifies that prohibition. It allows: (i) separate educational systems set up for pupils of the two sexes on an equivalent basis; (ii) educational systems separated for religious or linguistic reasons, offering an education which is in keeping with the wishes of the pupil's parent or legal guardians, on an optional basis and if the education provided conforms to certain standards; (iii) private educational institutions, if their object is not to exclude any group but to provide educational facilities in addition to those provided by the public authorities, under certain conditions. This article does not refer to special measures, but only determines when separate educational systems will not be deemed to constitute discrimination. Moreover, it does not explicitly provide for special public schools.

57. Article 5 of the same Convention relates to the right of members of national minorities to carry on their own educational activities, such as the teaching of their own language, provided that this right is not exercised in a manner which prevents the members of those minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty. The standard of such education should not be lower than the general standard and attendance at such schools should be optional. States parties have to undertake all necessary measures to ensure the application of this right, but there is no suggestion that the State is obliged to provide financial or other assistance to the group. Thornberry labels this a case of negative rather than positive freedom.[40] The travaux préparatoires also indicate that special measures aimed at meeting special requirements of persons in particular circumstances, such as backward children, the blind, immigrants and illiterate populations, were not "unjustified" preferences, but rather would raise deprived persons to a condition of genuine equality.[41]

58. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1966, deals in article 1, paragraph 4, with measures taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms.

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

59. This paragraph should be related to article 2, paragraph 2, of the same Convention which imposes on States parties the duty to take special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

It was underlined that protection of certain groups did not constitute discrimination, provided that such measures were not maintained after the achievement of the aims for which they had been taken.

60. Both articles find their origin in article 2, paragraph 3, of the United Nations Declaration on the Elimination of all Forms of Racial Discrimination adopted in 1963. The reason that the Convention deals twice with the same problem is that while article 1 defines discrimination and its paragraph 4 refers to a case in which the application of different treatment should not be deemed discriminatory, article 2 relates to duties which are imposed by the Convention on States parties; both insist upon the temporary character of the special measures, a reaction that was inspired by the then existing system of apartheid. In the debate on the paragraph on special measures, some representatives were concerned that special measures could be used as a weapon by Governments anxious to perpetuate the separation of certain groups from the rest of the population, or to justify colonialism. However, it was made clear that the aim should not be to emphasize the distinctions between different racial groups, but rather to ensure that persons belonging to such groups could be integrated into the community, in order to attain the objective of equal development for all citizens.[42]

61. The Seminar on the elimination of all forms of racial discrimination, held in 1968, undertook an important discussion on the legitimacy of reservations and quotas. According to one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who had been victims of discrimination, but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standards of merit.[43]

62. The importance of the UNESCO Declaration on Race and Racial Prejudice of 1978, although only a declaration, cannot be underestimated as it was widely supported, being adopted unanimously by acclamation. It is considered to have become part of the international law of human rights, being a comprehensive international instrument that deals with the protection of cultural and group identity and the value of diversity. In article 1 of the Declaration, it is stated that all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. The right to be different should not, however, serve as a pretext for racial prejudice nor justify discriminatory practices, nor provide a ground for the policy of apartheid. Article 9, paragraph 2, requires that special measures be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. This article does not mention "adequate advancement" as an aim of special measures, which makes the Declaration a bit less paternalistic and shows due respect to different groups.

63. The article further states that particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health and to facilitate their social and occupational advancement, especially through education.[44]

64. The Convention on the Elimination of All Forms of Discrimination against Women of 1979 had a precedent in article 3 of the International Covenants:

> "The States Parties to the present Covenant undertaken to ensure the equal right of men and women to the enjoyment of all economic, social and cultural [civil and political] rights set forth in the present Covenant".

65. Many representatives thought that this article was merely a duplication of the general non-discrimination clauses in article 2 of the ICCPR and of the ICESCR, and in article 26 of the ICCPR. It was pointed out, nevertheless, that article 3 did not merely state the principle of equality but enjoined States to make equality an effective reality.[45] As such, the Human Rights Committee asserted in its General Comment No. 4 that article 3, like articles 2.1 and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, of which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done by simply enacting law.[46]

66. In 1975 the ILO adopted a Declaration on Equality of Opportunity and Treatment for Women Workers.[47] Article 2, paragraph 2, states that positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory.[48] In the same vein, UNESCO decided in 1979, in view of the handicaps facing girls and women, that until "full equality" of education and training opportunities was assured, there was a need for special programmes for girls and women, so as to enable them to reduce and eventually eliminate the gap.[49]

67. During the drafting of the Convention on the Elimination of All Forms of Discrimination against Women the question of special measures was discussed. It was emphasized that the establishment of temporary conditions for women aimed at establishing de facto equality should not be considered discriminatory. Article 4 provides explicitly:

> "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
>
> "2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

68. That this article was controversial is apparent from the reactions of France and the United Kingdom, which insisted that the Convention should in no way require Governments to impose "reverse discrimination", by which they meant "discrimination in favour of women", since - save in certain carefully defined circumstances - this would represent a permanent departure from the objective of equal status and opportunities and would not be in the long-term interest of women themselves. On the other hand, the Convention should permit, but not require, temporary affirmative action measures in special fields to equalize opportunities for women in situations where it was necessary to overcome an undesirable historical link. States admitted that

although this might appear to be discriminatory, it was necessary to right wrongs done against women in the past because of their sex. However, it was stressed that this should be seen essentially as a temporary measure, which in the long term should become unnecessary.[50]

69. The special protection measures concerning maternity were also problematic for some States. Some States felt that one's physical constitution was not a matter of sex but something that applied to both women and men. Moreover, there was a lack of consensus during the drafting as to whether a convention should deal with equality between men and women or the elimination of discrimination against women.

70. In its General Recommendation No 23 on political and public life the Committee refers to temporary special measures in the following way:

> "While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures [have] been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens."[51]

IV. FORMS OF AFFIRMATIVE ACTION

71. Affirmative action is often treated under a generic heading, as though affirmative action measures are uniform. Yet an ILO study by Hodges-Aeberhard and Raskin demonstrates that, in reality, the methods by which these objectives are operationalized may vary too: compliance with affirmative action legislation can be demonstrated by implementing a range of policies developed to suit a particular context.[52] Some forms of affirmative action will be more effective or appropriate to promote equality than others, depending on the particular context and the political choice that has been made. Moreover, as was pointed out in the preliminary report, affirmative action measures must always comply with the principle of non-discrimination. As

long as "affirmative action" takes the form of "affirmative mobilization" or of "affirmative fairness", such special measures give no rise to controversy, contrary to measures which take the form of "affirmative preference".

A. Affirmative mobilization or affirmative fairness

72. The special measures may be called measures of "affirmative mobilization" when, through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution.[53] This can occur through announcements or other recruitment efforts, where it has been made sure that they actually reach the targeted groups. An example would be the setting up of job-training programmes to enable members of minorities to acquire the skills that would allow them to compete for jobs and promotion. The rationale is that equality in fact will not be achieved if the effects of discrimination have deprived people of the opportunities to acquire the skills that are necessary for competing effectively.[54] Affirmative recruitment would, therefore, through remedial interventions such as job training, out-reach and other skill-building or empowerment programmes, place those who have been disadvantaged in a condition of competitiveness. It can also mean seeking out and raising awareness among members of disadvantaged groups who might not know of benefits available to them in the field of housing or other social goods.

73. Special measures may be called measures of "affirmative fairness", when a meticulous examination takes place in order to make sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion. In other words, have they been judged on merit or has racism or sexism been a factor in the evaluation process? This can be ascertained by establishing effective and credible grievance or complaint procedures to handle allegations of discrimination, review procedures to double-check personnel actions, and examination of practices in an attempt to eliminate non-intentional discriminatory practices. All this is to ensure that the criteria used for hiring or promotion are validated for job-relatedness and did not serve as a mask for racial or gender discrimination. It means that, when it comes to how people are hired or promoted, decision-making has to be colour-blind and people must be treated on the basis of their individual merits rather than on their status as a member of a particular group. It boils down to the idea that the "best qualified" ought always to be hired.

74. Affirmative mobilization and affirmative fairness both entail measures dedicated to overcoming the social problems of a target group, but the measures do not themselves entail discrimination against people who are not members of that group. Rather, they place the costs of affirmative action on the whole society. In that way, these measures are colour-blind, but when it comes to the motivation of the measures or their strategic planning or monitoring, the approach is definitely race-conscious. It is probably for that reason, among others, that affirmative recruitment and affirmative fairness are well received and accepted.

B. Affirmative preference

75. Affirmative preference means that someone's gender or race will be taken into account in the granting or withholding of social goods. Affirmative preference measures can mean two things.

76. First, they can mean that when two equally qualified persons apply for a job, promotion, grant, etc., preference will be given to the person belonging to a designated group that is the beneficiary of affirmative action measures.

77. Second, they can also include other more radical measures,[55] such as prohibiting members of non-designated groups from applying for opportunities. Or, they can be allowed to compete, but even if they are better qualified, preference will still be given to designated groups. Members of designated groups can be automatically given additional points in competitive examinations, which is called "race-norming". Lower standards can be applied to them when evaluating their applications for university or employment. Informal percentages, guidelines, goals, quotas or reservations can be imposed that fix the proportions of social goods the designated groups must receive. [56]

78. Affirmative preference is the most controversial form of affirmative action. Opponents claim that a consequence of this sort of affirmative action is the decline of occupational and professional standards and that it can even lead to stigmatization. Moreover, it emphasizes group remedies as the best way to improve the situation of target groups. This group approach evokes widespread resistance. Entitlement to benefits solely on account of group membership, stresses once more the dilemma that exists, especially in liberal democratic States, of individual versus group rights.[57]

79. Many find that this type of affirmative action constitutes discrimination, because it treats people as members of groups or categories without regard to individual merit.[58] Although persons have validly satisfied the criteria, they will be nonetheless denied what would otherwise be their just due. Discrimination takes place through the rationing of social goods and this will mean that some members of other groups will no longer be considered for these social goods which are now only in limited supply. This places the costs of affirmative action on specific individuals. In essence, this kind of affirmative action inflicts an injury on members of group A in order to promote the welfare of members of group B. It creates problems under human rights law, (a) because these injuries are usually imposed in areas of life such as health, education, labour and political participation that are protected by specific articles in the international treaties concerning human rights and (b) because the criteria for imposing the harms (the basis for classifying people as A or B) are typically the very grounds that are expressly forbidden under non-discrimination provisions. It will thus be very difficult to reconcile demands of legal strategies sensitive to the problems of target groups with the seemingly contradictory demands of individual justice.

80. In the 1997 Report on the World Social Situation, it was maintained that Governments impose quotas or other hard preferences without first building consensus, thus alienating citizens who lose their right to compete on equal terms. Without consensus, quotas become extremely divisive. The Report blames Governments for finding hard preferences attractive because they do not require increased taxation or expenditure. It is much easier to impose quotas than to attack the underlying causes of de facto inequality between groups, including discrimination, poverty, poor education, malnutrition and geographical isolation, through redistribution of income.[59]

V. AFFIRMATIVE ACTION MEASURES MAY NOT LEAD TO DISCRIMINATION

81. Of particular importance when assessing affirmative action measures is their relationship with the principle of non-discrimination, which is the reverse formulation of the principle of equality and one of the most - if not the most - fundamental human rights. The principle of equality has been solemnly affirmed in the 1948 Universal Declaration of Human Rights, which states, "All human beings are born free and equal in dignity and rights", and in article 1 of the Charter of the United Nations, which asserts as one of the goals of the Organization "to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". A similar provision is contained in all the human rights instruments of the international regional systems, such as the Council of Europe, the Organization of American States and the Organization of African Unity.

82. Non-discrimination is primarily a legal technique employed to counteract unjustified inequality, founded on the idea that a State may not legitimately disadvantage an individual on an arbitrary basis.[60] The prohibition of discrimination can be found in all international instruments.

83. Non-discrimination and affirmative action if not carefully framed may clash with each other. Where the non-discrimination principle removes factors such as race, gender, nationality, etc. from the society's decision-making processes, affirmative action seeks to ensure full and substantive equality by taking those factors into account.[61] However, affirmative action, in its desire to achieve equality, can sometimes use extreme measures and thereby violate the non-discrimination principle. Therefore, affirmative action policies must be carefully controlled and not be permitted to undermine the principle of non-discrimination itself. In order to understand when affirmative action becomes discrimination, it is worthwhile having a close look at the travaux préparatoires of several international instruments containing non-discrimination principles.

84. During the preparation of the non-discrimination provision in article 7 of the Universal Declaration, the Chairman of the United Nations Commission on Human Rights, Eleanore Roosevelt, stated that equality did not mean identical treatment for men and women in all matters, for there were certain cases where differential treatment was essential. This was a clear reaffirmation of the idea that "equality" was not only to be understood in its normative sense but also in its formal sense.[62]

85. The ambiguous terminology in the non-discrimination provisions of international human rights instruments, which have used the terms "distinction" and "discrimination" interchangeably to cover the same concept, has created great confusion.[63] For example, there is an inconsistency in article 2 of the International Covenants: the International Covenant on Economic, Social and Cultural Rights guarantees that "the rights enunciated in the present Covenant will be exercised without discrimination of any kind", whereas the International Covenant on Civil and Political Rights guarantees "the rights recognized in the present Covenant, without distinction of any kind".

86. The English version of article 14 of the European Convention on Human Rights states: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", while the French version uses the term "distinction".

87. It is generally admitted that, whatever word was used, the drafters intended to include in both Covenants and in the European Convention the same level of protection. Both terms clearly exclude only "discrimination" understood as "arbitrary" or "unjust distinction".

88. The concept that not all distinctions are unlawful was crucial during the drafting of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, where an overwhelming majority endorsed an amendment proposed by Argentina, Italy and Mexico replacing the word "distinction" with the word "discrimination".[64] The stated purpose was to confirm that certain distinctions might be justified to promote the position of certain backward and underprivileged sectors of the population.

89. Similarly, in its General Comment on article 26, the general non-discrimination principle of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that "the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance" and that "not every differentiation of treatment will constitute discrimination".[65]

90. In the same vein, the European Court of Human Rights affirmed in the Belgian Linguistics case that:

> "In spite of the very general wording of the French version ('sans distinction aucune'), article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized. This version must be read in the light of the more restrictive text of the English version ('without discrimination')."[66]

91. The concept of non-discrimination has further been clarified by a number of studies carried out by special rapporteurs of the Sub-Commission.[67] Modern legal doctrine makes the following conclusions:

(a) Nowadays, it is universally accepted that the term "discrimination" has to be reserved for arbitrary and unlawful differences in treatment.[68] "Distinction", on the other hand, is a neutral term, which is used when it has not yet been determined whether a differential treatment may be justified or not. The term "differentiation", on the contrary, points to a difference in treatment, which has been deemed to be lawful;[69]

(b) Consequently, not every different treatment is prohibited - only those treatments that result in discrimination. This raises the question of when differential treatment becomes unacceptable, or when a distinction of any kind can be justified.[70]

92. International courts and authors looked for criteria which enabled a determination to be made as to whether or not a given difference in treatment contravened the non-discrimination principle.

93. In the South West Africa cases, Judge Tanaka affirmed that equality being a principle and different treatment an exception, those who refer to the different treatment must prove its raison d'être and its reasonableness; it must not be given arbitrarily but be in conformity with justice.[71]

94. In the Belgian Linguistics case, the European Court, following principles which may be extracted from the legal practice of a large number of democratic States, held that:

> "the principle of equality is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."[72]

95. These principles have been repeatedly applied in a great number of later cases.[73]

96. The United Nations Human Rights Committee has followed the European Court of Human Rights in its position, and declared in its views and General Comment No. 18 that:

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[74]

97. Various authors have also analysed the different constitutive elements of discrimination.[75] One of these elements is the ground on which the distinction is based. The enumeration of the prohibited grounds in general human rights instruments is non-exhaustive. This follows clearly out of the enlargement of the 4 grounds enumerated in the Charter of the United Nations (race, language, religion and sex) to the 12 grounds in the Universal Declaration of Human Rights and both Covenants, to the 13 grounds in the European Convention on Human Rights, as well as from the use of the words "such as" which precede the enumeration of these grounds.

98. Consequently, a distinction based on another ground can be arbitrary and some distinctions based on some of the enumerated grounds are not necessarily illegitimate. The ground on which a distinction is based is nevertheless important in determining whether the distinction is arbitrary or not. However, it is not the ground itself that is decisive, but the relationship or the connection between the ground and the right in regard to which the distinction is practised. There needs to be a "sufficient connection" between the right and the ground or, in other words, the ground has to be deemed "relevant" for the specific right in regard to which the distinction is practised. The general aim or the goal pursued by the legislation in question is not decisive, but the relevance of the particular ground with respect to the particular right is. A

distinction introduced by legislation in the pursuit of a perfectly legitimate goal can nevertheless be discriminatory - and as such constitute a violation of human rights - if the ground on which the distinction is based cannot be deemed relevant to the right in question.

99. Replacing the notion of "irrelevant" by the notion of "arbitrary" is not just substituting one word for another. The difference lies in the level at which the illegitimate character of the distinction has to be assessed. If this level were to be situated in relation to the general aims and goals of the legislation, the assessment would be purely political and inappropriate for judicial determination. The whole point, however, is that a legal rule is not necessarily legitimate because it pursues a legitimate goal. The law as a technique used to attain certain goals has to respect certain inherent requirements. The most fundamental of these is respect of the equality principle, which prohibits the introduction of distinctions based on grounds which are irrelevant for the particular right or freedom.

100. While still requiring a value judgement, which can be influenced by political considerations, the evaluation of the relevance of the ground by assessing the connection between this ground and the right or freedom concerned remains a judicial act. The previous identification of the ground (on which the distinction is based) and of the matter (in which the distinction is practised) as a right reduces the political element to a strict minimum and safeguards the judicial character of the evaluation. The approach should not be basically different when evaluating distinctions introduced in the framework of a policy of "affirmative action".

VI. CONCLUSIONS

101. There is no doubt that a persistent policy in the past of systematic discrimination of certain groups of the population may justify - and in some cases may even require - special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups. "Affirmative action" or "positive action" is the proper term which covers such special measures.

102. A wide variety of measures are labelled measures of affirmative action. Indeed, measures presented as measures of affirmative action may take very different forms. Those measures do not give rise to controversy as long as they take the form of "affirmative mobilization", when, through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a job, or "affirmative fairness", when a meticulous examination takes place in order to make sure that the members of a targeted group have been treated fairly in the attribution of a job. The matter is more delicate when the measures take the form of "affirmative preference". But even those measures are not objectionable as long as preference is given to members of the targeted group only if they are as equally qualified as others not belonging to that group.

103. In matters of human rights, a preference may only be justified if it is based on a ground which is relevant to the right at stake. For instance, in matters of employment and education, the principal criterion is competence. A classical example is the hiring of a violinist for an orchestra. The decisive criterion has to be the competence of the candidate in playing the violin. It is not relevant to take into account the colour, the sex, the religious faith, the language or the political

persuasion of the candidate. Only the competence of the candidate in playing the violin should be the determining factor. In order to avoid members of the jury being influenced by irrelevant factors, the violin test may even be taken behind a closed curtain. If someone needs life-saving surgery, the factor the patient cares about is the capacity of the surgeon to perform the operation, all other factors have at the most only a peripheral importance.

104. Nevertheless, for certain matters, other criteria than competence may also be relevant and be taken into account. Some criteria are relevant for some matters and not for other matters. Particularly in the public sector, other criteria than competence, such as the proportional representation of the different groups composing a given society, may be considered relevant. In the field of politics, members of the Government are appointed on the basis of the confidence they enjoy from the political groups that constitute the majority in Parliament. The determining factor is "representativity". In a diverse society, proportional representation of specific groups may be considered desirable. In some cases, the electorate may even be divided on the basis of criteria which are considered particularly relevant in the exercise of political power. Sometimes such criteria may even be taken into account in large sectors of public life, including the civil service, the military, the police, the judiciary, etc.

105. It is not possible to make sweeping general statements as to the extent to which such criteria may be taken into account. It depends on the specific circumstances of the society in which the measures are taken. Different historical, cultural, sociological, economic and other elements which are specific to the society in question have to be taken into account. It is the proper role of judges - administrative, judicial or even constitutional or international judges - to verify in each particular case whether the rule or its application respects the prohibition of discrimination and the principle of equality before the law to which everybody is entitled.

106. In cases of "affirmative preference",[76] special attention should be given to the "temporary" nature of the measures taken. While this requirement is generally admitted, the duration of most of those measures is "indefinite", "open-ended" or "indeterminate" and no cut-off date is specified in the law. Moreover, if a cut-off date is specified, it can happen that it is nevertheless extended without a previous review of the scheme of "affirmative preference". The necessity of the measures is often invoked without the non-controversial forms of affirmative action ("affirmative mobilization" or "affirmative fairness") first having been tried and without the proportionality of the measures taken having been examined. In evaluating the necessity of the measures taken, it should be checked whether the gains afforded and the harm done by the measures are sufficiently balanced, by showing that the measures are indeed achieving what they are intended to do, on the one hand, and by monitoring the harm inflicted on those who suffer from the measures taken, on the other hand. Persons on whom the measures have a direct impact should be enabled to participate in the evaluation of the measures. The central question is whether the costs of advancing a social objective may be transferred to some individuals on the basis of an inherited guilt, rather than to the society as a whole.

107. It is quite obvious that no measure intended to favour members of groups which were previously in a disadvantaged position may be justified simply by referring to the intent of the measure taken, however legitimate that intention may be. Everyone is entitled to the enjoyment of fundamental rights and freedoms and nobody may be discriminated against in the enjoyment

of his or her fundamental rights and freedoms, regardless of the objective pursued by the discriminatory measure. The discriminatory effect depends on the characteristics of a specific measure used to pursue a given objective and not on the objective itself.

108. The prohibition of discrimination would be a principle without any normative value, if any distinction could be justified by qualifying it as a measure of affirmative action. The principle of equality and non-discrimination, the most basic principle of human rights, which applies to all rights, freedoms and guarantees, would become meaningless if measures which clearly and manifestly deprive persons of any right, freedom or guarantee on the basis of a criterion which is not relevant to the right or freedom in question, were justified by labelling such measures as affirmative action measures. A good intention or a legitimate objective is not sufficient to justify any distinction based on whatever ground in any matter. It is not sufficient that the persons favoured by the measure taken belong to a group whose members were previously the victims of exactly the same kind of measures. An injustice cannot be repaired by another injustice. It is not because the descendants of the victims of the past are substituted for the descendants of the oppressors of the past, that a discriminatory measure ceases to be illegal and becomes consistent with the requirements of the protection of human rights and fundamental freedoms.

109. It is not because a national authority qualifies a measure it has taken as a measure of affirmative action policy that the measure is justified. The prohibition of discrimination also applies to measures qualified by national authorities as measures of affirmative action. It is up to the national authorities to find ways and means to adopt measures of affirmative action which are designed to help members of groups previously discriminated against to overcome the lasting consequences of past policies of discrimination. In general, national authorities should take measures which help those persons to acquire the same qualifications as members of groups which were favoured in the past. Through measures of affirmative action, the former should be helped to acquire the qualifications asked for, rather than by lowering the level of those qualifications. Efforts should be undertaken to improve the qualifications of target groups rather than creating different sets of requirements on the basis of criteria which are not relevant to the particular matter.

110. In a society where persons belonging to certain groups still suffer from past discriminatory practices, States should pursue a policy of affirmative action. This does not mean, however, that whatever measure those States may take under the heading of affirmative action is compatible with its human rights obligations. The State may help persons belonging to such groups to overcome those handicaps, but this has to be done in a manner which does not violate the fundamental rights and freedoms of persons not belonging to such groups.

111. The simple fact that a particular category of the population has suffered from disadvantageous economic or social conditions does not mean that, in order to upgrade its material position, any distinction based on the characteristic defining the group should be considered legitimate, even if this ground is irrelevant as a basis of distinction with regard to a particular right. It would not be justifiable to provide special social benefits to persons who do not need them but who belong to a category which formerly was in a disadvantaged position, and to deny the same benefits to persons who do need them but belong to a category which previously enjoyed better conditions in society.

112. Affirmative action should be centred on taking measures expected to meet the particular needs of the category it is intended to favour, rather than on restricting the benefits of the measures on the basis of the element which distinguishes that category from the other members of the population, but which is not relevant to the right concerned. It is through the choice, timing and location of the measures, that the policy can favour the target category without violating the rights - including their right to equal protection of the law without discrimination - of persons not belonging to that category. In no case may someone be deprived of a basic right on the pretext that doing so would help particularly disadvantaged groups better to overcome the consequences of previous discrimination.[77]

113. Affirmative action policies are only admissible insofar as they do not contravene the principle of non-discrimination. This means that if a distinction is made, due attention should be given to the ground on which the distinction is based in deciding whether this distinction amounts to discrimination or not. However, it is not the ground itself that is decisive, but the connection between the ground and the right with regard to which the distinction is practised. There has to be a sufficient connection between the right and the ground. The ground has to be deemed relevant to the specific right on which the distinction is based. The aim or goal pursued is not decisive. The judicial assessment of whether distinctions are arbitrary goes a step further than assessment undertaken at a purely political level. Thus, affirmative action to ensure full equality is not always legitimate. Affirmative action should not be interpreted as justifying any distinction based on any ground with respect to any right merely because the object of the distinction is to improve the situation of disadvantaged individuals or groups. Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action.

114. The present report does not propose an easy tool to evaluate measures of affirmative action. The principle of equality and non-discrimination itself is already a difficult concept which has given rise to much controversy. The concept of affirmative action is even more complex and its practise is not yet developed to an extent sufficient to allow for a common ground of understanding of its limits. The ambiguity of the concept and particularly the wide variety of measures taken by Governments to pursue a policy of affirmative action explain the difficulty of the subject. The only ambition of the present report is to create awareness of the complexities of the issue. It will have served a useful purpose if it stimulates further research and further thought on this matter in order to enhance the enjoyment of human rights and freedoms of all human beings without any discrimination.

Notes

[1] For instance, in the United States the "protected" groups that were to benefit from affirmative action were identified as follows: American Indians or Alaskan Natives: persons having origins in any of the original people of North America and who maintain cultural identification through tribal affiliation or community recognition; Asian or Pacific Islanders: persons having origins in any of the original peoples of the Far East, South-East Asia, South Asia or the Pacific Islands; Blacks: persons having origins in any of the black racial groups of Africa; Hispanics: persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. In South Africa, the designated groups are Black people (African people), people classified as "Coloureds" and Indian South Africans, women and people with disabilities. For more on the question of racial identity in South Africa, see P.E. Andrews, "Affirmative action in South Africa: transformation or tokenism", Law in Context, 1999, pp. 91-93.

[2] G. Moens, Affirmative Action, the New Discrimination, Sydney, The Centre for Independent Studies, 1985, pp. 81-82.

[3] L. Newton, "Reverse discrimination as unjustified", International Journal of Ethics, 1973, vol. 83, pp. 311-312.

[4] See C. Hamilton, "Affirmative action and the clash of experimental realities", The Annals, 1992, vol. 523, pp. 10-18. The clashing experiences of African Americans and immigrants also produce different political demands and attitudes towards what is owed by the society.

[5] N. Glazer, Affirmative Discrimination: Ethnic Inequality and Policy, New York, Basic Books Inc. Publishers, 1978, pp. 198-200.

[6] G. Moens, op. cit., pp. 82-83, quotes Sowell (T., Preferential Policies, an International Perspective, New York, William Morrow and Cy Inc.) as follows: "It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a DeFunis or a Bakke. Even aside from personal influence on admissions decisions, the rich can give their children the kind of private schooling that will virtually assure them test scores far above the cut-off level at which sacrifices are made. Just as the students who are sacrificed are likely to come from the bottom of the white distribution, so the minority students chosen are likely to be from the top of the minority distribution. In short, it is a forced transfer of benefits from those least able to afford it to those least in need of it."

[7] For example, the person with a Spanish-surnamed mother who finds it advantageous to change his name, as in the United States affirmative action measures also apply to Spanish-surnamed Americans. N. Glazer, op. cit., p. 200.

The Indian Commission of 1953, which was established to make up a list of the backward classes to benefit from affirmative action, was confronted with the problem of high-placed castes giving up their status and position "lest they should lose the State help". F. de Zwart, "Positieve discriminatie en identiteitpolitiek in India: grenzen aan sociale constructies", Tijdschrift voor beleid, politiek en maatschappij, 199, No. 4, p. 268.

[8] See HRI/GEN/1/Rev.1, (1994), Part III.

[9] In Malaysia, the Chinese and Indian poor who work in rural areas as farmers, rubber tappers or miners and in urban areas as menial workers are as much exploited as their Malaysian counterparts. They are all victims of interracial as well as intra-racial exploitation. According to Philips, "exploitation is a matter of class and power as well as race, a matter of economics as much as ethnicity". Although Malays benefit from affirmative action, this has done more for the Malay and non-Malay upper classes. Therefore, Philips argues for effective targeting based upon a combination of class and location, rather than on ethnic groupings. E. Philips, "Positive discrimination in Malaysia: a cautionary tale for the United Kingdom", in B. Hepple, and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 352-353.

[10] For a general overview, see G. Pitt, "Can reverse discrimination be justified?", in B. Hepple, and E. Szyszczak, op. cit., pp. 281-299; C. McCrudden, "Rethinking positive action", Industrial Law Journal, 1986, vol. 15, pp. 219-243.

[11] In the words of President Lyndon Johnson, speaking about the aim of affirmative action programmes: "You do not wipe away the scars of centuries by saying: 'Now you are free to go where you want, and do as you desire' ... You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all the others', and still justly believe that you have been completely fair ... We seek ... not just equality as a right and a theory but equality as a fact and equality as a result." Excerpt from President Johnson's speech to graduates at Howard University, June 1965, as quoted in S.M. Cahn, (ed.), The Affirmative Action Debate, London, Routledge, 1995, p. xii.

[12] United States Commission on Civil Rights, Statement on affirmative action, October 1977, p. 2, as quoted in W.L. Taylor, and S.M. Liss, "Affirmative action in the 1990s: staying the course", The Annals, 1992, vol. 523, p. 31.

[13] See more in T. Loenen, "Indirect discrimination: oscillating between containment and revolution", in T. Loenen and P.R. Rodrigues, (eds.), Non-discrimination Law: Comparative Perspectives, The Hague, Kluwer Law International, 1999, pp. 195-211; M. Selmi, "Indirect discrimination: a perspective from the United States", in T. Loenen and P.R. Rodrigues, (eds.), op. cit., pp. 213-222; B. Vizkelety, "Adverse effect discrimination in Canada: crossing the Rubicon from formal to substantive equality", in op. cit., pp. 223-236. I. Sjerps, "Effects and justifications. Or how to establish a prima facie case of indirect sex discrimination", in op. cit., pp. 237-263.

The Human Rights Committee defines "discrimination" in its General Comment 18 as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (HRI/GEN/1/Rev.1, Part I, Human Rights Committee, General Comment 18, para. 7.) This definition is reflected in the Committee's case law, although somewhat inconsistently. For example, its views in K. Singh Bhinder v. Canada indicate that obvious instances of indirect

discrimination will breach the International Covenant on Civil and Political Rights (A/45/40, vol. II, annex IX, sect. E, Communication No. 208/1986). Finally, the Committee on the Elimination of Racial Discrimination states: "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin." (HRI/GEN/1/Rev.1, Part III, Committee on the Elimination of Racial Discrimination, General Recommendation XIV on article 1 of the Convention, para. 2.)

[14] See, for more, T.L. Banks, "Equality, affirmative action and diversity in the United States", C.R. Lawrence and M.J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action, Boston, Houghton Mifflin Company, 1997.

[15] In this case the Supreme Court refused to address directly whether racial preferences are permissible, ruling instead that the matter was moot since the petitioner, Marco DeFunis, would complete his legal education even if he lost.

[16] The diversity concept has lately been attacked in several federal courts. The validity of diversity as a goal was questioned by a federal appellate court in Hopwood v. Texas (78 F 3d 932, 5th Cir 1996, cert denied, 135 L Ed. 1094, 1997). The court reasoned that racial diversity in higher education is not a compelling governmental interest and is inconsistent with the concept of colour-blind or merit-based admissions criteria. See also Podberesky v. Kirwan (38 F 3d 52, 4th Cir 1994, cert denied, 131 L Ed. 1002, 1995), S. Thernstrom, "The scandal of the law schools", Commentary, December 1997, pp. 27-31. Moreover, in 1996 the University of California Board of Regents voted to prohibit the use of race, religion, sex, colour, ethnicity or national origin in admission, employment or contracting decisions at the University of California's nine public campuses. See also California's Proposition 209, forbidding racial preferences in higher education. See also scholars with an opposite opinion, who claim that the use of racial preferences in higher education is not at all effective and amounts in most cases to a flagrant double standard. Letting minority students earn their positions through their own merit would make for a healthier racial climate. Besides, they feel that the discussion on preferences in higher education has deflected attention from the real problem: the yawning racial gap in educational performance among elementary and secondary school pupils. As long as this gap exists, efforts to engineer parity in college are, according to them, doomed to fail. Another problem is that it has not been agreed upon how much "diversity" is enough and how much harm may be inflicted upon other individuals. S. Thernstrom and A. Thernstrom, "Racial preferences: what we now know", Commentary, February 1999, pp. 44-50.

[17] See more in K. Greenawalt, Discrimination and Reverse Discrimination, New York, Borzoi Books in Law and American Society, 1983, pp. 52-70; R.K. Fullinwider, The Reverse Discrimination Controversy, a Moral and Legal Analysis, New Jersey, Rowman and Littlefield, 1980, pp. 18-29; and I. Glasser, "Affirmative action and the legacy of racial injustice", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988.

[18] See M.O. Chibundu, "Affirmative action and international law", Law in Context, 1999, pp. 31-32. See also a paper prepared by F. de Varennes, "Minority rights and the prevention of ethnic conflicts" (E/CN.4/Sub.2/AC.5/2000/CRP.3).

[19] As quoted in J.D. Skrentny, The Ironies of Affirmative Action, Chicago, The University of Chicago Press, 1996, p. 113.

[20] See P.A. Samuelson, Economics, New York, McGraw-Hill Book Company, 1970, pp. 780-794.

[21] See for a discussion M.B. Abram, "Affirmative action: fair shakers and social engineers", in C. McCrudden, (ed.), Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. 499-513; S. Fredman, "Reversing discrimination", The Law Quarterly Review, 1997, pp. 575-600.

[22] For a summary of all the arguments for and against equality of opportunity and equality of results, see C. McCrudden, Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. xvi-xviii.

[23] See, for instance, on the evolution of affirmative action in Australia, G. Moens, op. cit., pp. 53-74, and for a history of affirmative action in the United States, D. McWhirter. The end of affirmative action, where do we go from here?, New York, Birch Lane Press, 1996.

[24] T. Sowell, (op. cit., p. 165) recalls that in the United States, preferential policies have repeatedly been rejected in public opinion polls. However, the same United States public has strongly supported special educational or vocational courses, free of charge, for the empowerment of minority groups.

[25] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation, 1997 (E/1997/15), chap. VIII, para. 94.

[26] United Nations document A/C.3/SR.1182, para. 17.

[27] United Nations document A/C.3/SR.1183, paras. 12 and 29.

[28] M. Craven, The International Covenant on Economic, Social and Cultural Rights, a perspective on its development, Oxford, Clarendon Press, 1995, p. 158.

[29] Committee on Economic, Social and Cultural Rights, General Comment No. 1, para. 3 in United Nations document HRI/GEN/Rev.4 (2000).

[30] Ibid., General Comment No. 5, para. 9.

[31] Ibid., General Comment No. 13, paras. 32-33.

[32] United Nations documents A/C.3/SR.1257, para. 18; A/C.3/SR.1258, paras. 18, 38, 45, 47 (UAR); A/C.3/SR.1259, para. 33. See M. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, Dordrecht, Martinus Nijhoff Publishers, 1987, p.55.

[33] United Nations document E/CN.4/SR.122, pp. 8 and 11.

[34] Human Rights Committee, General Comment No. 18, para. 10, in HRI/GEN/1/Rev.4 (2000).

[35] Communication No. 198/1985, in Selected Decisions of the Human Rights Committee Under the Optional Protocol, vol. 2 (United Nations publications, Sales No. E.89.XIV.1).

[36] Communication No. 385/1989, in Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XII, sect. P.

[37] P. Thornberry, International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, p. 284. Referring to article 1 (4) of the International Covenant on the Elimination of All Forms of Racial Discrimination and article 4 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, which do contain explicit statements about the legitimacy of affirmative action measures, he points out that a contrary interpretation in the context of the Covenants would display an "extraordinary lack of congruence".

[38] A.P. Vijapur, "The principle of non-discrimination in international human rights law: the meaning and scope of the concept", India Quarterly, A journal of international affairs, 1993, p. 91.

[39] While recognizing this, M. Craven (op. cit., at note 3, p. 186) argues that, although the Committee on Economic, Social and Cultural Rights implicitly recognizes an obligation through the requirement that States concentrate upon the situation of vulnerable and disadvantaged groups in society, this is nevertheless a matter that ideally should be made clear in a future general comment.

[40] Thornberry further states that this is reinforced by article 3 (d) of the Convention by which States undertake "not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group". He believes that the equality and non-discrimination promised by the Convention to minority groups is the equality and non-discrimination provided for the community as a whole, without regard to cultural differences. In any dispute involving an abuse of rights arising from an interpretation of the Convention, the balance is clearly in favour of the State, which can find ample scope to deny their practical exercise. P. Thornberry, op. cit., at note 13, pp. 289-290. He refers also to UNESCO General Conference document 11C/15 (see E/CN.4/Sub.2/210) according to whose analysis article 5 does not support the notion that States are obliged to provide public or publicly supported schools.

[41] UNESCO document 11C/15, annex III, para. 36 and E/CN.4/Sub.2/210, annex III, para. 13.

[42] See N. Lerner, The UN Convention on the Elimination of All Forms of Racial Discrimination, Alphen aan den Rijn, Sijthoff and Noordhoff, 1980, pp. 32-39. P. Thornberry, op. cit., at note 13, pp. 265-268. India especially expressed strong support for the inclusion of special measures in the Covenant and referred to its own domestic situation, where the Constitution of India expressly authorizes special measures to protect backward groups, i.e. the Scheduled Castes and Scheduled Tribes.

[43] See United Nations document ST/TAO/HR.34, paras. 147-155.

[44] See also article 5, paragraph 2, which points out the duties of States in education against racism and contains a clause on general affirmative action: States should take "appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children".

[45] M. Bossuyt, op. cit. at note 7, pp. 75-79. The same arguments were used by those who considered a specific convention on women unnecessary in view of the texts already in existence. MacKean comments: "Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact - not the abolition of differences between the roles of men and women in marriage, but rather the equitable differences of rights and responsibilities." There was certainly a feeling that de facto equality should be increased. As such, the representative of the USSR commented that the Third Committee was "elaborating principles of de jure equality; from these principles would arise the de facto equalization of human rights". He continued, "equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant". W. MacKean, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, p. 182.

[46] Human Rights Committee, General Comment No. 4, para. 2, in HRI/GEN/1/Rev.4 (2000).

[47] Adopted on 25 June 1975 by the 60th Session of the International Labour Conference. See United Nations document E/CN.6/603.

[48] The ILO had already undertaken efforts concerning equal remuneration for work of equal value. See ILO Equal Remuneration Convention, 1951 (No. 100), I. Brownlie, Basic documents on human rights, Oxford, Clarendon Press, 1981, p. 200.

[49] See United Nations document E/CN.6/632, para. 92.

[50] L.A. Rehof, Guide to the "Travaux Préparatoires" of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dordrecht, Martinus Nijhoff Publishers, 1993, pp. 66-76.

[51] Committee on the Elimination of Discrimination against Women. General Recommendation No. 23, Political and public life, para. 15, in HRI/GEN/1/Rev.4 (2000).

[52] J. Hodges-Aeberhard and C. Raskin Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities, Geneva, International Labour Office. They documented their study with eight case studies on Canada, India, Lebanon, Malaysia, Norway, the Philippines, the Russian Federation and Uganda.

[53] Alison Sheridan ("Patterns in the policies: Affirmative action in Australia", Women in Management Review, 1998, pp. 243-252) has developed a classification system that illustrates the broad range of this type of "affirmative mobilization" measures in the specific context of combating sex discrimination and disadvantage in employment.

[54] Section 35 of the United Kingdom Race Relations Act renders lawful "any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits". Section 37 states that positive action may be taken to encourage members of a racial group, or members of one sex, to apply for, or be specially trained for, work in which they have been underrepresented.

[55] This is especially the case in the United States, where the implementation of Executive Order 11246 was left up to the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Committee (EEOC). They interpreted affirmative action as a set of specific and result-oriented procedures, making use of timetables and goals. Under President Nixon, affirmative action came to mean the setting of statistical requirements based on race, colour, and national origin for employers and educational institutions. The various federal departments created the first major "quota" plans. These quota plans are very controversial, and have been the subject of extensive case law. Yet, the acceptance of quotas and reservations will depend on the specific situation in which they will apply. For instance, most Americans seem to accept the use to correct instances of specific historic discrimination. Even conservative persons accept the idea of court-ordered quotas when past discrimination has been proven in a court of law.

[56] Quotas are objectives of personnel representation within a company or institution which are quantified and which have to be achieved within a precisely described time period. These quotas are imposed by the State or by court order. It can be that companies or institutions are ordered to make sure that within five years 10 per cent of their personnel are women. It can be that companies or institutions have to be sure that for every four men that are employed, one woman is contracted. Quotas have the discriminatory intent of restricting a specified group from a particular activity. Goals, on the other hand, are numerical target aims which a company or institution tries to achieve; formulated otherwise, only a "good faith effort" to reach them is required.

The aim is not discriminatory but affirmative in intent: to help increase the number of qualified members of a disadvantaged group in the company or institution. Yet often, in practice, goals will operate as quotas, by putting the burden on the employer to rebut the presumption of discrimination. See N. Glazer, "The future of preferential affirmative action", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988, pp. 329-339.

[57] See for a discussion on this issue, R.T. Bron, Affirmative Action at Work. Law, Politics and Ethics, Pittsburgh, University of Pittsburgh Press, 1991, pp. 37-59; J. Edwards, "Collective rights in the liberal state", Netherlands Quarterly of Human Rights, 1999, pp. 259-275.

[58] See S.M. Lipset "Equal chances versus equal results", The Annals, 1992, vol. 523, pp. 63-74. The United States dilemma remains how best to resolve the contradiction between the United States egalitarian creed and the legacy of slavery.

[59] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation 1997, (E/1997/15), paras. 105-106.

[60] Non-discrimination and equality constitute nowadays basic and essential principles relating to the protection of human rights. Consequently, they have also become principles of customary international law. Extensive support for this view is to be found in various authoritative international instruments proclaiming the principle of non-discrimination, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UNESCO Declaration on Race and Racial Prejudice, etc. Furthermore, authoritative legal institutions, such as the International Law Commission and the International Court of Justice, have made declarations in that sense. See, for example, the statements of the ICJ in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970), in the Barcelona Traction case (1970), and in its Advisory Opinion on Namibia (1971). The view is also supported by State practice and a strong opinio juris voiced at various international conferences and by authoritative experts.

[61] See United States Supreme Court Justice Blackmun's dictum: "in order to get beyond racism, we must first take race into account". Regents of the University of California v. Bakke, 438 U.S. 265, 1978.

[62] See United Nations document E/CN.4/SR.50, para. 9. For an explanation of the discussion on "distinction" and "discrimination", which reappeared later during the drafting of the International Covenants, see also J.T. Möller, "Article 7", in A. Eide, et al. (eds.), The Universal Declaration of Human Rights: A Commentary, Oslo, Scandinavian University Press, 1992, pp. 115-141.

[63] On the history of this ambiguity, see M. Bossuyt, L'Interdiction de la discrimination dans le droit international des droits de l'homme, Bruxelles, Bruylant, 1976, pp. 7-27; N. Lerner, Group rights and discrimination in international law, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 24-28; B.G. Ramcharan, "Equality and non-discrimination", in L. Henkin (ed.), The International Bill of Rights, New York, Columbia University Press, 1981, pp. 258-259.

[64] See United Nations document A/5365, p. 22.

[65] Human Rights Committee, General Comment No. 18, Non-discrimination, paras. 8 and 13, in HRI/GEN/1/Rev.4 (2000).

[66] European Court of Human Rights, Belgian Linguistics case, 23 June 1968, Ser. A, p. 34. The Court admitted that doing so would lead to absurd results - every legal provision which does not secure to everyone equal treatment would be contrary to article 14. This would be an untenable position, as law necessarily makes distinctions of many kinds.

[67] For a good summary, see A.P. Vijapur, "The principle of non-discrimination in international human rights law: the meaning and scope of the concept", India Quarterly, A Journal of International Affairs, 1993, pp. 73-74. W. MacKean, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, pp. 94-96. For example, in 1949, the Secretary-General stated in his memorandum on the main types and causes of discrimination that discrimination is a detrimental distinction based on grounds which may not be attributed to the individual and which have no justified consequences. See United Nations document E/CN.4/Sub.2/40.

[68] Bossuyt, op. cit. at note 32, p. 27. MacKean, ibid., pp. 8-11.

[69] This is consistent with the international definitions on discrimination. "Discrimination" was not defined in the Universal Declaration or in the two International Covenants. The first definition of discrimination is to be found in the International Convention on the Elimination of All Forms of Racial Discrimination which provides that the term "racial discrimination" shall mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Similarly, the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

The Human Rights Committee has used these definitions of specific forms of discrimination to construct a more general definition. According to the Committee discrimination should be understood to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms". General Comment No. 18, para. 7.

Other definitions are to be found in the ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111), which states: "For the purpose of this Convention the term discrimination includes - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ... ." The UNESCO Convention against Discrimination in Education (1960) asserts: "For the purpose of this Convention, the term 'discrimination' includes any

distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ... ."

[70] See C. Tomuschat, "Equality and Non-Discrimination under the CCPR", in I. Von Munch, Festschrift für Hans-Jürgen Schlochauer, Berlin, Walter de Gruyter, 1981, pp. 712-716.

[71] Dissenting Opinion of Judge Tanaka, South West Africa cases, (2nd phase), ICJ Report 1966, pp. 284-316. Judge Tanaka keenly observed that the principle of equality requires that those who are equal be treated in an equal manner, and those who are different be treated differently. However, he asserted, the principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Although people have certain common characteristics, they nevertheless possess independent attributes and qualities, which may legitimately be taken into account in the distribution of social goods. The fundamental questions, however, remain: When can people be said to be equal or different, and which considerations may form legitimate justifications for differential treatment?

[72] European Court of Human Rights, op. cit. at note 66; M. Bossuyt, "Het discriminatieverbod van de Europese Conventie van de Rechten van de Mens in de Rechtspraak van de Commissie na het Belgisch taalarrest", Revue belge de drcit international, 1972, pp. 503-528.

[73] The European Court's analysis of non-discrimination has been quoted with approval by the Inter-American Court of Human Rights in its Advisory Opinion oc-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica of 19 January 1984, para. 57: "There would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind".

[74] See also, T. Opsahl, "Equality in Human Rights Law, with special reference to article 26 of the ICCPR", in M. Nowak, (ed.), Kehl, N.P. Engel Verlag, 1988, pp. 51-65. Case law: S.W.M. Broeks v. Netherlands, Communication No. 172/1984, Zwaan-de Vries v. Netherlands, Communication No. 182, 1984 Official Records of the General Assembly Forty-second Session, supplement No. 48 (A/42/40), annex VIII, sections B and D: because article 26 lays down a general principle of non-discrimination, the full range of this non-discrimination signifies that the Committee has competence to review any differential treatment, even in the field of economic, social and cultural rights, in order to determine if it amounts to discrimination.

[75] Bossuyt, op. cit. at note 32, p. 262; M. Bossuyt, "The principle of equality in article 26 of the International Covenant on Civil and Political Rights", in A. De Mestral (ed.), The Limitation of Human Rights in Comparative Constitutional Law, Cowansville, Éditions Yvon Blais, 1986, pp. 283-284; E.W. Vierdag, The Concept of Discrimination in International Law with Special Reference to Human Rights, The Hague, Martinus Nijhoff, 1973, p. 176.

[76] This paragraph is based on notes provided to the author by Bruce Abramson.

[77] Lord Denning: "So here if this education authority were to allocate boys to particular schools according to the colour of their hair or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether and this Court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English". As quoted by MacKean, op. cit. at note 67, p. 246.

Annex

Excerpts of some of the replies received by the Special Rapporteur

The reply of the Government of the **Fiji Islands** refers to section 3 (1) of the Act to implement the social justice provisions (chap. 5) of the Constitution of the Fiji Islands by establishing programmes of affirmative action and for related matters (the Social Justice Act 2001), which provides that:

> "... 'affirmative action' means State policies to assist groups or categories of persons who are disadvantaged, so as to enable them to achieve equality of access with groups who are not disadvantaged",
>
> 'disadvantaged', in relation to a group or category of persons, means that the group or category does not have equality of access by virtue of the actual or supposed personal characteristics of the members of the group or by virtue of the location or educational level of the category or group;".

The reply of the Government of **Greece** refers to the Council of State of Greece, which in judgments issued in 1998 stated that:

> "in the case that it is established that against a certain category of persons such discriminations have been undoubtedly created in practice that the unswerving application of the principle of equality results in an equality only for the sake of appearances, while it virtually consolidates and perpetuates an existing status of inequality, it is within the spirit of the constitutional principle of equality, for the legislator to take the corresponding common or regulative, affirmative measures in favour of persons in such a category, in cases where such measures are appropriate and required, for a certain period of time, in order to reduce the existing inequalities until real equality is established".

In Greece affirmative measures relate mainly to vocational training programmes, motives for employment in professional sectors where the representation of a sex is low, as well as special care for persons with special family obligations. Such measures were taken with the intention of benefiting women, war invalids, persons belonging to the Muslim minority of Thrace and persons having family obligations.

In **Hungary**, according to the reply of the Government, "positive discrimination shall not be deemed as constitutional, if a social objective or a constitutional right can only be enforced by giving 'additional rights' to a specific social group. Article 70/A, paragraph 3, of the Constitution provides that the Republic of Hungary shall endeavour to implement equal rights for everyone through 'measures that create fair opportunities for all'".

The Government of Hungary states that "the limits of positive discrimination are the prohibition of discrimination relating to equal dignity and the fundamental rights articulated in the Constitution". "The prohibition of disadvantageous discrimination and the fundamental rights anchored in the Constitution" limit positive discrimination. According to the Hungarian Constitutional Court, in its decision No. 28/2000, positive discrimination is legitimate in the context of equal opportunities "if it has the purpose of mitigating the disadvantageous situation of an individual". In other decisions the Constitutional Court has pointed out that positive discrimination cannot be arbitrary and it must be based on a reasonable motive.

According to article 5, paragraph 6, of the Labour Code of Hungary, a rule relating to an employment relation may provide an obligation to give preference, in the case of identical conditions, to a specific group of employees.

Article 49 of the Hungarian Act No. LXIV/1990 on the Election of Local Government Representatives and Mayors ensures the possibility of a "preferential electoral mandate" for candidates of national and ethnic minorities in settlements with 10,000 or fewer residents. A minority candidate will obtain a mandate if he receives at least one half of the votes of the candidate acquiring a mandate with the lowest number of votes in accordance with the general rules, provided that no other candidate of the same minority has gained a mandate.

In its reply, the Government of **Israel** recognizes that "There is some controversy regarding its meaning" and notes that "there are also other names for the concept of affirmative action: 'preferential advancement', 'discrimination advancement', 'positive discrimination', and 'reverse discrimination'".

The Government of Israel states that according to a judge of the Israeli Supreme Court, affirmative action is a "counterbalancing distinction" which is an "integral part of the principle of equality" rather than an "exception to it".

According to another judge:

> "the provision of equal opportunities is likely to bring about equality only when the starting point of the competing parties is more or less identical. ... The considerable disparity in equal opportunities, whether deriving from discriminatory laws that were valid in the past but are now no longer in force, or resulting from invalid ideas rooted in society, enhances the chances of the stronger groups while reducing the opportunities of weaker groups. Affirmative action aims to rectify this discrepancy. ... through the practical advancement - both planned and intentional - of the disadvantaged group to positions which it had been denied in the past, we are not only rectifying the practical distortions of inequality but also creating a new reality which will ultimately eliminate the hidden roots of discrimination and its consequences. In this way, the step of affirmative action, intended essentially as a means of rectifying a specific inequality, serves to bring about the realization of the general principle of equality".

The Amendment to the Israeli Law for Equal Rights of Women (March 2000) provides under the heading "Permissible distinctions and affirmative action" that:

> "The following are not considered to be an infringement of equality or prohibited discrimination: (1) Distinctions between a man a woman, to the extent that they are necessitated by substantive differences between them, or by the nature or essence of the matter; (2) A provision or action intended to rectify previous or existing discrimination against women, or a provision or action intended to advance their equality ...".

In Israel, affirmative action measures are taken to ensure appropriate representation for women and men in public institutions, to advance the Arab and Druze education system and to favour persons with disabilities.

According to the reply of the Government of **Pakistan**, affirmative action in that country consists of programmes and procedures that give specific representation to residents of smaller provinces, non-Muslims, women, veterans and disabled persons in job hiring and admission to institutions of higher education in accordance with a prescribed quota system. The biggest national affirmative action is the quota system, designed to ensure adequate representation to various provinces according to the proportion of their population. Although the Punjab has over 55 per cent of the population of Pakistan, it has accepted to allow residents of smaller provinces to join the federal services of Pakistan in the proportion of 50 per cent.

The affirmative action benefits the following categories: residents of economically backward areas, women, religious minorities, disabled persons, veterans and their children. The affirmative action schemes apply to the following fields: employment in government service, educational institutions and the ballot box (non-Muslims have separate electorates and elect their own candidates to the legislatures).

In a decision of 1992, the federal Shariat Court, the highest court in Pakistan to decide whether or not a law is repugnant to the injunctions of Islam, did not uphold the quota system. However, "in the national interest" the judgment was not implemented. The National Assembly passed a resolution on 30 June 1998 that the quota system should be extended for another 20 years on a fair and equitable basis and so that the rights of underdeveloped areas and of minorities might be protected. In a landmark judgment of 6 July 1998 it was held that "The provisions of the Constitution are to be so interpreted that the legitimate rights and interest of the federating units are safeguarded in juxtaposition with the Federation as far as possible ... Reservations, after all, seek to mitigate the effects of social disadvantage not to eliminate its causes". The Supreme Court upheld the judgment. The Constitution promulgated in 1973 provided that for 20 years "posts may be reserved for persons belonging to any class of area to ensure their adequate representation in the service of Pakistan". In 1999, the Constitution was amended and the quota system was extended for another 20 years to the year 2013.

According to the reply of the Government of **Tanzania**, various schemes, including affirmative action schemes, have been made by the Government to promote women. The affirmative action helps to counter discrimination against women and specific minority groups in areas such as employment, education, marriage inheritance, etc.

The reply of the Government of **Thailand** refers to section 30, paragraph 4, of the Constitution of Thailand (1997), which provides that:

> "Measures determined by the State in order to eliminate obstacles to or to promote persons' ability to exercise their rights and liberties as other persons do shall not be deemed unjust discrimination."

In Thailand, affirmative action may be applicable in the areas of education, employment, housing, transportation and scholarship.

According to the reply of the European Commission, on behalf of the **European Community**, it is the established case law of the European Court of Justice that the principle of equality is a general principle of Community law which requires that similar situations shall not be treated differently unless differentiation is objectively justified.

The Amsterdam Treaty introduced a new article 13 into the Treaty on the European Community providing the Community with specific powers to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Article 13 does not, however, possess any direct effect and creates no individual right to non-discrimination. It has purely legislative competence, with no question of individuals coming directly under its scope.

New article 141 (4) of the Treaty of Amsterdam states:

> "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

The Charter of Fundamental Rights of the European Union, proclaimed at the Nice Summit in December 2000, contains an article on equality between men and women (art. 23):

> "Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."

According to the reply of the **Universal Postal Union**, postal administrations are "urged to encourage women to apply".